The Nuremberg Files: Testing the Outer Limits of the First Amendment

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The Nuremberg Files, an anti-abortion website with both graphic images as well as personal information about abortion doctors, lists the names of abortion doctors, their addresses, and other personal information, noting the healthy abortion doctors in black type, "wounded" abortion doctors in gray, and murdered persons with lines through their names. Together with "wanted" posters of abortion doctors, a magazine promoting and celebrating abortion clinic violence, a yearly banquet honoring those imprisoned for acts of abortion violence, and a book about the use of force against abortionists entitled "A Time to Kill," the members of the American Coalition of Life Activists (ACLA) maintained that these expressions were entitled to full First Amendment protection as purely political speech, spoken in opposition to abortion rights.

This First Amendment defense was rejected by the U.S. District Court of Oregon in Planned Parenthood v. American Coalition of Life Activists, *finding that the defendants' conduct was a true threat of violence in violation of the Freedom of Access to Clinic Entrances Act of 1994 (FACE), requiring both legal and injunctive relief. In the face of much criticism of the verdict, criticism focused on the First Amendment protection of such volatile speech, Professor Vitiello argues that if the* Brandenburg *test of incitement to imminent lawless action allows prohibition of any speech, it would allow the prohibition of the speech of ACLA. Professor Vitiello argues that, viewed in its entirety, within a context of abortion clinic violence that the defendants supported, encouraged, and promoted, the speech of ACLA falls outside the bounds of protected First Amendment speech, and is properly subjected to civil and criminal penalty.*

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I. INTRODUCTION

Law enforcement agencies and organizations that monitor hate groups have recognized the increased risk created by access to the Internet.[1] As reported by the New York Times, law enforcement agents are concerned that hate groups target isolated individuals ripe for their message of hate.[2] Websites, inexpensive to create and largely unregulated, may inspire lone wolves to commit violent acts. Unlike more traditional hate groups that government agencies have infiltrated, modern hate groups and the potential millions of visitors to their websites cannot be effectively monitored.[3]

Governmental regulation of hate sites raises immediate First Amendment concerns. Modern First Amendment case law has limited the ability of the government to ban hate speech, even when it advocates unlawful conduct. As long as the speech remains abstract advocacy, rather than incitement to imminent violence, the speech is protected by the First Amendment.[4] But, in light of the inability of the government to monitor individuals inspired to act by hate sites, the cost of First Amendment protection has increased. Society, in effect, is subsidizing hate groups who can spread their messages at minimal cost over the Internet with little fear of reprisal.

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[1] *Hate Crime on the Internet: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (forthcoming) [hereinafter *Hatch, Hate Crime Hearings*] (Statement of Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary); News Release, Senate Comm. on the Judiciary, Statement of Sen. Orrin Hatch Before the Committee on the Judiciary Hearing on Hate Crime on the Internet (Sept. 14, 1999), *available at* http://www.senate.gov/~judiciary/91499ogh.htm ("[T]he Southern Poverty Law Center . . . which individually tracked sites for 254 hate groups in January of this year—up 50% from one year ago. And another group . . . the Anti-Defamation League—estimated the presence of some 500-600 hate groups on the web this June.").

[2] *See* Jo Thomas, *New Face of Terror Crimes: 'Lone Wolf' Weaned on Hate*, N.Y. TIMES, Aug. 16, 1999, at A1.

> The notion being preached in pamphlets, on telephone lines and on white supremacist websites is that of the romantic, heroic loner who fights his own private war, committing violent acts against the Government, Jews and racial minorities. A warrior working alone, supremacist leaders say, cannot be betrayed or infiltrated by the Federal Bureau of Investigation, a fate that has befallen some hate groups.

Id.

[3] *Hatch, Hate Crime Hearings, supra* note 1.

> [T]hese hate groups can be remarkably sophisticated, carefully avoiding obvious and explicit appeals to racism and anti-Semitism. Sometimes, the sites are disguised as personal home pages, with displays about innocent enough sounding topics as city biographies or historical figures. Scroll down from sites about Santa Barbara (California), or Martin Luther King, Jr., however, and what you will find is a rancid torrent of neo-Nazi invective.

Id.

[4] *See infra* Part III.B–D.

In February, 1999, a federal jury in Portland, Oregon, awarded several plaintiffs $107 million in damages against fourteen individual defendants and two radical anti-abortion groups.[5] Much of the litigation focused on whether the Nuremberg Files,[6] a website created by some of the defendants, amounted to a threat within the meaning of the Freedom of Access to Clinic Entrances Act of 1994 (hereinafter FACE).[7] The website included personal information about abortion providers in a context seemingly calculated to inspire violence against those named on its pages and may have contributed to the death of at least one doctor.[8] The *Planned Parenthood* litigation offers a case study involving the use of the Internet to spread a message of hate to thousands, and possibly millions, of readers, at minimal cost. Despite the website's message of violence, main stream media and First Amendment advocates have argued that the verdict is an attack on the First Amendment.[9]

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[5] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999).

[6] The Nuremberg Files appeared, in hard copy form, as a box of files containing personal identifying information on abortion doctors. *Id.* at 1133. The Nuremberg Files website contained information taken from the hard copy files. *Id.* at 1133-34. The website was originally hosted on the servers of MindSpring Enterprises. After the decision in the *Planned Parenthood* case, MindSpring shut down the site on February 5, 1999, stating that the site was in violation of their appropriate use policy and that MindSpring had no plans to restore it. The Nuremberg Files soon reappeared under the domain of Plebeian Systems. OneNet Communications, however, threatened to cut off Internet access to the smaller company if it did not remove the site. The site was then shut down again. Eric Silverberg et al., *The Nuremberg Files CS 201 Final Project, at* http://www-cse.stanford.edu/classes/cs201/projects/nuremberg-files/background.html (last visited Oct. 10, 2000) [hereinafter *Stanford Class Project*] (on file with the Ohio State Law Journal). Karen Spaink, a Dutch citizen, published the Nuremberg Files on her website explaining that although she completely disagreed with the views of the creators of the Nuremberg Files on the issue of abortion, she did believe in free speech. Two days later she decided to take the Nuremberg Files off of the Internet stating, "The debate about the use some perverts may or not make of the list is so heated that I decided to take it down. Yet I still believe that lists are part of free speech." Karen Spaink, *The Nuremberg Files: Motivation and Introduction, at* http://www.xs4all.nl/~kspaink/nuremberg/aborts.html (last updated on July 16, 2000) (on file with the Ohio State Law Journal). As late as August 2000, the Nuremberg Files website was hosted by Internet Freedom, *at* http://www.netfreedom.org. However, although the new publication of the site was very close to the original form, it was not exactly the same. The lists appeared on the site as well as the gruesome pictures and descriptions of why the site existed. In October 2000, as this article went to press, although the Nuremberg Files were not available on the Web, the administrators of Internet Freedom told the editors that this was due only to technical server problems and that the site would be available again soon. *Visualize Abortionists on Trial: The Nuremberg Files,* http://www.netfreedom.net/nuremberg/index.html [hereinafter *Nuremberg Files*] (hard copy, made June 24, 1999, on file with author and the Ohio State Law Journal).

[7] 18 U.S.C. § 248 (1994).

[8] *See infra* Part II.D.2.

[9] *See infra* Part II.B.

Examination of the *Planned Parenthood* litigation raises important questions about the scope of modern First Amendment case law. Critics of the judgment in *Planned Parenthood* portray the defendant as engaged in political speech, at most advocating violence in the abstract.[10] Further complicating the issue, the Nuremberg Files website did not expressly urge viewers to commit violence against abortion providers. But the website provided inspiration to do so and, by providing personal information about abortion providers, the site gave information helpful to those who were inspired to kill.[11] The litigation invites the question, did the defendants cross the line between advocacy and incitement. Careful review of the Supreme Court's case law also suggests ways in which state and federal governments may be able to criminalize dangerous hate groups.

Part II of this article examines the defendants' conduct that gave rise to the *Planned Parenthood* litigation.[12] Part III discusses the Supreme Court's case law governing incitement to violence. It reviews the pre-*Brandenburg* cases, especially the clear and present danger test as Justices Holmes and Brandeis would have applied it, in a series of dissenting opinions.[13] It then discusses the emergence of the *Brandenburg* test and its progeny, focusing on some of the uncertainty created by those opinions.[14] While those cases leave numerous questions unresolved, Part III also argues that some of those questions ought to be resolved in light of the underlying justifications for the First Amendment. Specifically, for example, insofar as the First Amendment advances self government or leads to the truth through a marketplace of competing ideas, speech creating a risk of harm to individuals is outside the scope of First Amendment protection.[15] Indeed, almost exclusively, the Supreme Court's incitement case law has involved speakers critical of governmental policy.[16] The Nuremberg Files goes beyond criticizing the Supreme Court's abortion doctrine and targets private individuals, speech entitled to less protection than speech involving political dissent.[17] Part IV discusses whether the Nuremberg Files website, especially when considered in conjunction with other of the defendants' activities, is entitled to First Amendment protection.[18] It concludes that, contrary to the view that the website is "part of vitriolic public debate over abortion,"[19] the

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[10] *See infra* notes 40–41 and accompanying text.

[11] *See infra* note 52 and accompanying text.

[12] *See infra* Part II.

[13] *See infra* Part III.A–C.

[14] *See infra* Part III.C–D.

[15] *See infra* notes 342–47 and accompanying text.

[16] *See infra* notes 338–43 and accompanying text.

[17] *See infra* notes 348–52 and accompanying text.

[18] *See infra* Part IV.

[19] Lawrence Viele, *Murder or Free Speech? Website Won't Back Down in Abortion Fight,* FULTON COUNTY DAILY REPORT, Feb. 8, 1999, [hereinafter Viele, Newspaper Article], *available* at LEXIS, News Library, Fulton County Daily Report.

Planned Parenthood defendants crossed the line between advocacy and incitement.[20] It concludes further that, in light of proven risk to human life and the limited deterrent value of a civil damages award, prosecutors should use the criminal law to protect those at risk.[21]

II. THE NUREMBERG FILES

A. *An Overview of the Litigation*

On October 26, 1995, two not-for-profit corporations that provide abortion services, and several doctors who perform abortions, filed an action in federal district court in Portland, Oregon, in which they named two Portland-based associations and several individual defendants active in the radical anti-abortion movement.[22] Among other claims, the complaint alleged that the defendants violated FACE, which created a private right of action for a person harmed by another who "by . . . threat of force . . . intentionally . . . intimidates . . . or attempts to . . . intimidate . . . any person because that person is or has been . . . providing reproductive health services."[23] The plaintiffs requested both compensatory damages and injunctive relief.[24]

The complaint alleged a number of specific acts of intimidation, most of which related to publication of "unwanted" or "wanted" posters of abortion providers, which included personal information about the doctors and their families.[25] After the district court denied the defendants' motion to dismiss, but before trial, several of the defendants helped to create the "Nuremberg Files."[26] Initially, the Nuremberg Files consisted of a box of files containing personal information about doctors who performed abortions.[27] In January, 1997, Neal Horsley, not a defendant in the case, created the Nuremberg Files website on the Internet.[28] The Nuremberg Files named some of the plaintiffs among those who

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[20] *See infra* Part II.D.2.

[21] *See infra* Part IV.B.3.

[22] Planned Parenthood v. Am. Coalition of Life Activists, 945 F. Supp. 1355 (D. Or. 1996).

[23] *Id.* at 1362; 18 U.S.C. § 248 (1994); *see also Stanford Class Project, supra* note 6.

[24] *Planned Parenthood,* 945 F. Supp. at 1365.

[25] *See infra* Part II.D.2.

[26] *See infra* notes 147–52 and accompanying text.

[27] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1132 (D. Or. 1999); Brief of *Amicus Curiae* ACLU Foundation of Oregon, Inc., Planned Parenthood v. Am. Coalition of Life Activists (9th Cir. 2000) (No. 99-35320) [hereinafter ACLU Amicus Brief], *available at* http://www.aclu.org/court/plannedparenthood_v_aclf.html (last visited Oct. 10, 2000) (on file with the Ohio State Law Journal).

[28] Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998).

would be brought to justice for taking innocent lives.[29] The district court ruled that evidence concerning the Nuremberg Files was admissible in the *Planned Parenthood* case.[30]

In February 1999, the jury entered a verdict in excess of $100 million against the defendants.[31] Shortly thereafter, the district court granted permanent injunctive relief ordering the defendants to desist from specific unlawful conduct.[32]

B. *Reaction to the Verdict*

Not surprisingly, the defendants argued in the district court that the First Amendment protected their conduct.[33] Post-verdict, they have continued to argue that the litigation was an attack on their free speech rights. For example, one of the defendants stated, "There's been only one death threat in this entire case and that's the threat to the First Amendment."[34] A second defendant stated that it was "a strategic lawsuit against political participation."[35] Horsley summed up the position of the defendants when he stated that "all we've done, and all really anybody's accused us of doing, is printing factually verifiable information. . . . If the First Amendment does not allow a publisher to publish factually verifiable information, then I don't understand what the First Amendment's about."[36]

Mainline commentators have joined abortion foes in raising First Amendment concerns about the *Planned Parenthood* litigation. Some newspaper

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[29] *See infra* notes 147–50 and accompanying text.

[30] *See Planned Parenthood*, 23 F. Supp. 2d at 1182. Although it did not explicitly state the evidence was admissible, the court did allow it to be heard.

[31] ACLU Amicus Brief, *supra* note 27. The defendants have now appealed to the Ninth Circuit.

[32] *Planned Parenthood*, 41 F. Supp. 2d at 1155.

[33] *See Planned Parenthood*, 41 F. Supp. 2d at 1154; *Planned Parenthood*, 23 F. Supp. 2d at 1191.

[34] Patricia C. Roberts, *$109 Million in Damages Against Pro-life Website*, CHRISTIANITY TODAY, Mar. 1, 1999, *at* http://www.christianityonline.com/ct/9t3/9t3020.html (last visited Oct. 10, 2000) (on file with the Ohio State Law Journal).

[35] *Id.*

[36] *Stanford Class Project*, *supra* note 6. Other anti-abortion activists agree. For example, one long time anti-abortion activist began photographing people entering a Planned Parenthood clinic in Spokane, Washington, out of anger with the judgment, which she saw as "an infringement on free speech and the right to oppose abortion." Bill Morlin, *Abortion Protester Tries New Tactic; Woman Vows to Send Photos of Local Doctors, Patients to 'Nuremberg Files,'* SPOKANE SPOKESMAN-REVIEW, Mar. 7, 1999, at B1. Neal Horsley, appearing on a panel discussing the dilemma created by hate speech cases, contended that the site never condoned attacks on doctors and told the audience that "[n]ow that I've been silenced, the possibility of violence is greater." Monica Whitaker, *Anti-Abortion Website at Core of Hate Speech Talks*, TENNESSEAN, Mar. 10, 1999, at 1B.

editorials argued that the Nuremberg Files amounted to protected speech. For example, one newspaper editorialized that the site is objectionable, distasteful and troubling. But that, according to the paper, is exactly the kind of speech that the First Amendment is intended to protect.[37]

Prominent First Amendment advocates have also questioned the verdict. For example, Paul McMasters, the First Amendment ombudsman at the Freedom Forum, believes that an appellate court may reverse the judgment because the jury instructions set the standard of liability too low.[38] He contends that, despite the objectionable nature of the speech, "the verdict has significant implications for all

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[37] *Shielding an Anti-Abortion Hit List,* ST. LOUIS POST-DISPATCH, Jan. 12, 1999, at B6; *see also* Peter Bronson, Editorial, *Net Losses,* CINCINNATI ENQUIRER, Feb. 5, 1999, at A22 (arguing that although the site was offensive, it did not explicitly advocate violence—instead, the threat was implicit—and further arguing the anti-abortion group was clearly engaging in political speech, the kind the First Amendment was designed to protect); Dick Helm, Editorial, *Freedom of Speech Takes it on the Chin,* COLUMBUS DISPATCH, Feb. 8, 1999, at 6A (arguing that the ruling against the site has slapped the First Amendment and our Constitution in the face; and further arguing that in a cause considered politically correct, the justice system is making an assumption that the free speech is going to lead to violence); *Legal, But Dangerous,* PALM BEACH POST, Feb. 5, 1999, at 16A (arguing that the repulsive website contains no direct threat, though it may have the same effect and that even the updating to cross off names of physicians who were killed is commentary, however twisted and hypocritical; and further arguing that appeals courts are likely to overturn the verdict); *Let 'Nuremberg' Site Stand,* ST. PETERSBURG TIMES, Jan. 15, 1999, at 16A (arguing that abortion is the most combustible issue of our day and all the Nuremberg site does is reflect this; and further arguing that if this country is still committed to free speech, the courts will not force it to turn down the heat); Ellen Wilson, Editorial, *Website may be vile, but it's protected,* ATLANTA J., Jan. 18, 1999, at 12A (defending Neal Horsley's right to post such "garbage" because it is the same right that allows her to call him a "hate-mongering idiot" and to argue just as vehemently against his views).

[38] *See* Viele, Newspaper Article, *supra* note 19; *see generally* Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats From Coercive Political Advocacy,* 74 WASH. L. REV. 1209 (1999) (discussing the Planned Parenthood decision and proposing a "synthesized test under which juries first would apply a four-part definition to distinguish threats from political advocacy, and second determine whether the speech poses a likelihood of imminent violence"); Robert D. Richards, *The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears,* 7 COMMLAW CONSPECTUS 291, 292–93 (1999).

> The messages on the Nuremberg files site contained no explicit threat of, or direct incitement to violence, raising the question of whether new remedies were indeed construed by the jury in its application of this law. If no explicit threat was made against abortion doctors on the web page, the question becomes why did the jury reach its conclusion and award such a massive amount of damages?
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> The magnitude of the verdict arguably reflects the jury's discomfort with or perhaps apprehension of the internet as a communications medium.

Id. In the most substantial discussion of the issue to date, Professor Steven Gey reaches a similar conclusion. Steven G. Gey, *The* Nuremburg Files *and the First Amendment Value of Threats,* 78 TEX. L. REV. 541 (2000).

kinds of other speech."[39] Professor Rodney A. Smolla argues that the Nuremberg Files website does not support a charge of accessory to murder. Instead, the website is "part of a vitriolic public debate over abortion." Smolla believes that "[m]uch of what is on [the website] comes with a presumption that it is violent rhetoric and hyperbole as opposed to actual incitement or aiding or abetting murder."[40]

University of Virginia Law Professor Robert O'Neal, director of the Thomas Jefferson Center for Free Expression, agrees that the website is entitled to First Amendment protection. For proof of "a direct incitement to lawless action," argues O'Neal, "[t]he message really has to be directed to the person, which posting something on a Website is not."[41]

Despite substantial sentiment that the website is entitled to First Amendment protection, the question of First Amendment protection is far closer than commentators have suggested. As developed below, that is so for at least three reasons. One, the Supreme Court case law does not create an absolute protection for speakers whose impassioned rhetoric leads to violence. Even its cases most protective of passionate rhetoric suggest that the First Amendment does not protect a speaker in all settings.[42] Two, the characterization of the Nuremberg Files that has emerged in the post-verdict press has understated the extent to which the website called viewers to commit acts of violence.[43] Three, commentators have ignored the larger context in which the defendants published the Nuremberg Files. If they were charged with inciting others to commit violence, a court would have to assess the defendants' entire course of conduct, even if in isolation the website was entitled to First Amendment protection.[44]

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[39] Viele, Newspaper Article, *supra* note 19.

[40] *Id.* A number of other commentaries raise similar concerns about the litigation. A speaker at a conference hosted by the Media Institute included the *Planned Parenthood* litigation among the bad news for the First Amendment. After noting "a menacing trend," he stated that "[t]his year, once again, the publishers of a website called the Nuremberg File [sic] were held to be responsible, if indirectly, for the actions of third parties taken against abortion providers .... [T]his area ... does constitute a very less promising area, indeed." *Id.* A lawyer who once served as vice chairman for the *New York Times* argued that the website contained no clear and unambiguous threat to any particular person and concluded that "[w]e are left with a case that started with alleged threats to doctors and ended with threats to all Websites and all media." *Id.*

[41] *Id.*

[42] *See infra* Part III.C–D.

[43] *See infra* Part IV.A.

[44] *See infra* Part IV.A–B.1. Professor Gey's recently published article makes the same mistake when he argues that the Nuremburg Files is entitled to First Amendment protection. Professor Gey reaches his conclusion, in large part, by ignoring the additional evidence introduced at trial and the context in which the *Planned Parenthood* defendants published the Nuremburg Files. Gey, *supra* note 38.

C. *The Nuremberg Files*

The Nuremberg Files website is powerful material. The creators of the Nuremberg Files chose the name to create a parallel to the Nuremberg Trials conducted after World War II.[45] Its creators argue that abortion is a violation of natural law and that abortion is legal only because of the Supreme Court's exercise of raw judicial power, an act contrary to the Constitution.[46] Thus, because *Roe v. Wade*[47] was lawless, and because at some future date, some natural disaster "might cause the normal order of government to break down,"[48] the creators of the files began collecting information about abortion providers and their supporters to preserve evidence for when they are put on trial for mass murder and to prevent them from escaping justice as some Nazi war criminals were able to do after the war.[49]

The website included a caption "Visualize Abortionists on Trial; The Nuremberg Files," and a picture of a woman in a jury box pointing an accusing finger at a man, apparently a doctor on trial for performing abortions. Below that picture was a line of dripping blood.[50] The site also accused the doctors of various crimes, including genocide, mass murder, and infanticide.[51]

The site also asked readers to send information about abortion providers and their supporters, including clinic owners, security personnel, judges, and politicians supportive of abortion rights. The information sought included not just names, but also photographs or videotapes of the doctors, their vehicles, homes, and friends. The site also requested personal data including date and place of birth, home and business addresses and phone numbers, Social Security numbers, license plate numbers, names and birth dates of spouses, children and friends, criminal records, driving records, mug shots, fingerprint cards, civil suit records, depositions, divorce files, affidavits of former employees, former patients, former

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[45] *Nuremberg Files, supra* note 6.

[46] REV. MICHAEL BRAY, A TIME TO KILL: A STUDY CONCERNING THE USE OF FORCE AND ABORTION 116–17 (1994) [hereinafter A TIME TO KILL].

[47] 410 U.S. 113 (1973).

[48] *An Indictment for Murder, at* http://www.alaweb.com/~savbabys/Indictment.html (last visited Oct. 11, 2000) (on file with the Ohio State Law Journal).

[49] *See Nuremberg Files,* supra note 6. In the text, I use the past tense to describe the Nuremberg Files. The *Planned Parenthood* defendants have distanced themselves from the website and Horsley continues to make changes to the website. The text describes the website at the time of the *Planned Parenthood* litigation.

[50] *Id.* This most recent version of the site has undergone changes from the original version. The site now states that there will be live web cams soon placed outside of abortion clinics to watch people going in and out. The new version also displays a list of links to news articles about the site.

[51] Plaintiff's Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment at 33, Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999) (No. CIV. 95-1671-JO) [hereinafter Plaintiff's Memorandum].

spouses, newspaper clippings, news video, and anything else that might help to convict the abortion providers.[52]

The site had a link to a section about doctors who perform third trimester abortions and another link to a full page of gruesome pictures of aborted fetuses.[53] It also invited viewers to access the names already collected.[54] Listed were the names of over 250 doctors (as the site calls them, "the baby butchers"), numerous clinic owners and workers ("their weapons and bearers"), judges ("their shysters"), politicians ("their mouthpieces"), law enforcement ("their bloodhounds"), and "miscellaneous spouses and other blood flunkies."[55] The page was captioned "Alleged Abortionists and Their Accomplices." The page contained another line of dripping blood and a legend explaining how the list works.[56] If a name was listed in black, the person was still working; if in gray, the person had been wounded; if a line appeared through a name, that person had been killed.[57] Throughout the site, viewers were asked to send more names.[58] Another link offered a viewer the office addresses for the people listed on the site.[59] The site creators made numerous calls for "justice,"[60] including the conviction and execution of abortion providers. A companion page on the website argued that the murder of abortion providers is morally justified and contained a letter from Paul Hill, currently on death row in Florida, describing the joy that he experienced after murdering a doctor and his body guard.[61]

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[52] *See Nuremberg Files, supra* note 6; *see also* Skipp Porteous, *Banquet of the White Rose,* ALBION MONITOR, Feb. 18, 1996, *at* http://www.monitor.net/monitor/abortion/whiterose.html [hereinafter Porteous, Newspaper Article] (on file with the Ohio State Law Journal).

> "The goal of the project," according to David Crane, the group's national director, "will be to gather all available information on abortionists and their accomplices for the day when they may be formally charged and tried at Nuremberg-type trials for their crimes. The information in these files will be specifically that kind of evidence admissible in a court of law." . . .
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> "We don't want to make the mistakes that allowed so many Nazis to escape justice after World War II," said Paul deParrie, one of the assistants involved in the project.

Id.

[53] *See Nuremberg Files, supra* note 6.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* ("We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against the wanton slaughter of God's children (as it surely will). . . . These classes of individuals are all committing various crimes to which they should answer.").

[61] *Id.; see also Stanford Class Project, supra* note 6 (explaining that the essay by Hill is titled "Why I Shot an Abortionist," in which Hill writes, "It was unpleasant for me to have to

According to its defenders, the Nuremberg Files website is powerful advocacy, representing an unpopular political position. As such, it is entitled to First Amendment protection, contrary to the ruling of the trial court in *Planned Parenthood*. As developed below, that argument misses the point.[62]

D. Planned Parenthood v. American Coalition of Life Advocates

1. *The Defendants' Support of Violence*

Despite post-verdict commentary, *Planned Parenthood* was about far more than the Nuremberg Files. Instead, the Nuremberg Files website was only one piece of evidence demonstrating the defendants' threatening conduct and commitment to violence.[63]

To prevail under FACE, the plaintiffs had to prove that the defendants' conduct amounted to a threat of violence.[64] The plaintiffs amassed considerable evidence, occurring over several years and involving far more than just the Nuremberg Files. Much of the conduct preceded the creation of the website by several years.[65]

The American Coalition of Life Activists (hereinafter ACLA),[66] one of two organizations named as a defendant, was formed in 1994 when it split from more mainline pro-life groups because of ACLA's insistence that violence against abortion providers was justified.[67] Most of the individual defendants were actively involved in ACLA activities.[68] Many of the individual defendants signed a document approving of the 1993 murder of a doctor who performed abortions. They also refused to commit to non-violence at a national meeting of pro-life groups. "Because [many of the defendants] advocated the use of 'force' and justifiable homicide, they were no longer allowed to be leaders of Operation Rescue and therefore agreed to form a new organization that became ACLA."[69] Co-defendant Andrew Burnett, ACLA co-founder and the executive director of

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kill two human beings—even though one was a murderer and the other his accomplice. But the privilege of being used to save innocent children continues to change this unpleasantness into joy.").

[62] *See infra* Part IV.

[63] Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

[64] *Id.* at 1188.

[65] Planned Parenthood v. Am. Coalition of Life Activists, 945 F. Supp. 1355, 1362–63 (D. Or. 1998).

[66] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1131 (D. Or. 1999); *see generally* Viele, Newspaper Article, *supra* note 19.

[67] *Planned Parenthood*, 41 F. Supp. 2d at 1136.

[68] *See id.*

[69] *Id.*

Advocates for Life Ministries (hereinafter ALM), made clear ACLA's commitment to violence against abortion providers when he stated that "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us."[70]

All of the defendants were involved in ACLA activities and none disapproved of its goals or activities.[71] Those activities included its continued support of the White Rose Banquet, a function "to honor 'prisoners of Christ,' those confined to prison for their anti-abortion criminal activities."[72] Co-defendant Michael Bray hosted the banquet in 1996 and 1997.[73] The White Rose Calendar, published by co-defendant Bruce Murch and distributed at the banquet, "commemorates anti-abortion violence and its perpetrators."[74] The calendar displayed photographs of the wreckage of bombed abortion clinics and of various individuals who have committed anti-abortion violence. On its cover, the calendar included a photograph of Paul Hill, who murdered an abortion provider and a member of his security detail. Hill was portrayed with a sign supporting the murder of abortion providers. As developed in more detail below, ACLA also "unveiled" the Deadly Dozen poster (a document which included names and other information about abortion providers) and the Nuremberg Files at different events sponsored by the organization.[75]

The other organization named as a defendant, ALM, was closely associated with ACLA.[76] ALM published a magazine, distributed internationally, that has published articles advocating the use of force to disrupt abortion services.[77] The

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[70] *Id.*

[71] *Id.* at 1137.

[72] *Id.* at 1138; *see also* Portious, Newspaper Article, *supra* note 52.

[73] *Planned Parenthood,* 41 F. Supp. 2d at 1139.

[74] *Id.*

[75] *Id.* at 1132.

[76] *See id.* at 1137.

[77] *See id.* at 1135; Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998). In the magazine, ALM advertises and sells Bray's "EXECUTE Murderers, Abortionists" bumper stickers. The magazine has republished the Deadly Dozen Poster and has featured Michael Griffin, Paul Hill and Shelley Shannon on the cover. When Shelley Shannon shot Dr. George Tiller, she had, in her possession, copies of the magazine featuring articles and photos of Dr. Tiller so that she could identify him, his vehicle and his clinic. ALM endorsed these acts by Shelley Shannon. ALM documents and material were deleted and destroyed by Associate Director Ramey after the litigation had commenced. One issue of the magazine noted that Paul Hill was in the process of preparing an "unwanted poster" of Dr. Britton and described the activities of Hill and others in identifying and surveilling Dr. Britton. The same issue also commented that the murder of Dr. David Gunn had caused many more doctors to quit out of fear for their lives and that those who had not quit were "scared stiff." The magazine also advertised and promoted the White Rose Banquets and other ACLA events as well as maintaining the hard copy of the Nuremberg Files during the course of the lawsuit.

magazine reported violence in the anti-abortion movement, acts which were publicly praised by Life Advocate's editor-in-chief.[78] ALM also published co-defendant Michael Bray's book *A Time to Kill*.[79] Bray is a minister, now the head of a small congregation that has split off from the mainstream Lutheran Church.[80] He served forty-six months in federal prison for conspiracy to bomb seven abortion facilities.[81]

A Time to Kill argues that violence against abortion providers is morally and legally justified.[82] Bray relies on Biblical authority to demonstrate a Christian's obligation to defend innocent life with force, even killing force. In addition, he contends that the law recognizes the use of homicide in defense of innocent life under the doctrine of necessity.[83] According to Bray, "[t]here is . . . a time to wield the sword and bring death to another for the sake of a third party."[84] He asks rhetorically, "if Scripture justifies revolution, how much more does it justify the defense of an innocent individual?"[85]

Bray "support[s] the principle of revolution and the goal of establishing a Christian government."[86] But he does not call for a revolution at this time because "American Christians are too morally apathetic to carry out such an enterprise at this time."[87] Instead, he is "simply trying to establish the principle of godly force: Where baby killing takes place, it is right and good to intervene with force to prevent such a blasphemous deed."[88]

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[78] *See Planned Parenthood,* 41 F. Supp. 2d at 1135.

[79] *Id.* at 1137.

[80] *See 60 Minutes II: The Minister's Blessing; Michael Bray is a Minister Who is Leading What He Considers Holy War Against Abortion Providers* (CBS television broadcast, Apr. 14, 1999) [hereinafter *60 Minutes II Broadcast*], transcript *available at* LEXIS, CBS News Transcripts.

[81] *Planned Parenthood,* 23 F. Supp. 2d at 1185.

[82] A TIME TO KILL, *supra* note 46, at 105.

> We think, rather, that if citizens wish to honor their state's true laws above the fiats of renegade judges, they do a good thing. Regarding the issue at hand, citizens who act on the principles of their state codes do not violate the law by taking defensive action in behalf of preborn people. They only violate the will of tryants [sic].
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> . . . Laws may be justifiably broken in the course of preventing a harm. The argument has been admitted occasionally in court regarding blockades of abortuaries. The same argument which applies to the action of "peaceful" blockading of entrances to childslaughter houses applies to force against either the facilities or the persons committing the crimes.

Id.

[83] *Id.* at 111–12.

[84] *Id.* at 158.

[85] *Id.* at 160.

[86] *Id.* at 163–64.

[87] *Id.* at 171.

[88] *Id.* at 172.

He does hedge on whether he is advocating the murder of doctors. He draws a distinction between advocating killing, which he disclaims, and failing to condemn "forceful, even lethal, action which is applied for the purpose of saving innocent children."[89] As he states, "We remain (pardon the expression) 'pro-choice.'"[90]

The district court found that Bray made a variety of statements consistent with his views articulated in *A Time to Kill*.[91] For example, Bray wrote an article in Life Advocate in which he stated that he traded his copy of the Army of God Manual.[92] Elsewhere, he was quoted as stating that "[a]nyone who truly believes that the slaughter of children is what we have with abortion could go out and shoot an abortion provider."[93] Bray also created a bumper sticker stating "EXECUTE Murderers" with the word "Abortionists" directly below those words. He has distributed them at anti-abortion events and through the mail since 1992.[94]

Co-defendant Cathy Ramey contributed an essay to *A Time to Kill* in which she summarized the argument in defense of Michael Griffin, who murdered abortionist Dr. David Gunn, and Shelley Shannon, who wounded Dr. George Tiller, also an abortion provider. She stated what appears to be the position of members of ACLA: "The actions [of Griffin and Shannon] amounted to nothing more than providing a defense for innocent people who were going to be killed by

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[89] *Id.* at 173–74.

[90] *Id.* at 174.

[91] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1138–40 (D. Or. 1999).

[92] *See Nightline: The Army of God Extremism and Violence Used in the Name of God* (ABC television broadcast, Mar. 9, 1998) [hereinafter *Nightline Broadcast*], transcript *available at* LEXIS, ABC News Transcripts.

> [T]he Army of God. A shadowy group with no known leader, no known headquarters, an army that may be one person or a thousand, may be organized or a loose network. About all that appears certain is that the Army of God is willing to kill to prevent abortions. They even have a manual telling precisely how to do it.

Id. See also James Langton, *International: Attacks drive US doctors from abortion; The American attorney general is set to launch a special investigation amid a climate of violence and intimidation,* THE DAILY TELEGRAPH (London), Nov. 8, 1998, at 30 ("The Army of God first emerged in 1982 with the kidnapping of an Illinois doctor and his wife. A threatening letter sent to the supreme-court judge who wrote the landmark *Roe v. Wade* judgment, which legalised abortion in 1973, was also signed by the organization.").

[93] *See Nightline Broadcast, supra* note 92.

[94] Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998).

an unjust aggressor."[95] Their "defensive action" of the innocent, she argues, is justified in light of Biblical text.[96]

The district court found that "Ramey has stated that it is a good thing when abortion providers are shot."[97] The court quoted her trial testimony that "I think that there is an element of justice that is undeniable [when an abortion provider is shot], and whether we recognize that legally or not... there is an element of justice."[98]

Other co-defendants have expressed similar views to those of Bray and Ramey. The various co-defendants have participated with and have actively supported people like Paul Hill, Shelley Shannon, and Michael Griffin, who have murdered or attempted to murder abortion providers.[99] For example, co-defendant Donald Treshman set up a fund to support accused killer Michael Griffin after Griffin shot Dr. David Gunn. Prior to Gunn's murder, John Burt handed out wanted posters to people in Pensacola where Gunn worked;[100] among those receiving the poster was Griffin. After Gunn was murdered, Treshman dispatched a press release, setting up a fund for Griffin's defense. Treshman, along with Burt, a member of Rescue America,[101] was proud that their group had organized the rally during which Gunn was murdered. Gunn's estate sued Burt and Treshman, among others, for their role in Griffin's decision to commit murder.[102]

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[95] *See* A TIME TO KILL, *supra* note 46, at 184. The article originally appeared in the *Life Advocate* magazine published by ALM.

[96] *Id.* at 186–87.

[97] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1149 (D. Or. 1999).

[98] *Id.*

[99] *Id.* at 1132.

> Among those who signed a petition supporting the acquittal of Shannon were defendants ALM, Bray, Burnett, Dodds and McMillan. Defendant Dawn Stover publicly supported Shannon on national television. In his October 1993 editorial for Life Advocate, defendant Burnett stated, "Shelley was a courageous women [sic] that we were very proud to be associated with."

Id. See also id. at 1134 ("Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Catherine Ramey and Dawn Stover signed a 'Defensive Action' petition circulated by Paul Hill declaring the murder of Dr. Gunn justifiable and calling for Griffin's acquittal."); *id.* at 1135 ("Defendants Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition calling for the acquittal of Paul Hill. The petition was identical to that circulated by Hill in support of Michael Griffin.").

[100] *See id.* at 1135; Plaintiff's Memorandum, *supra* note 51, at 5–6.

[101] Plaintiff's Memorandum, *supra* note 51, at 6.

[102] *Id.* at 6 n.2 ("[E]vidence in that case demonstrated that Burt had shown Griffin graphic anti-abortion literature, an aborted fetus in a jar, an effigy of an abortion doctor with a noose around his neck and a sign stating that 'whoever sheds man's blood, by man his blood shall be shed.'").

Other co-defendants have frequently stated their support of murderers like Griffin and Hill. For example, co-defendant McMillan called Hill "a patriot," and a "wonderful man" who "fired the first shots in this war."[103] The co-defendant protested outside an abortion provider's office shortly after Gunn was shot, holding up a sign reading, "Dr. Shah, do you feel under the Gunn?"[104]

After Canadian abortion provider Garson Romalis was wounded while he sat in his Vancouver home, co-defendant Treshman praised the shooting on national television. According to Treshman, the sniper's choice of tactic was "superb" because shooting the doctor in his home from a distance allowed the sniper to escape undetected.[105]

Co-defendant McMillan, who invoked his Fifth Amendment right to silence when asked if he had damaged an abortion clinic, "promotes violence against abortion providers and abortion clinic workers."[106] According to McMillan, "those employees choose to work in a place where human beings are being killed. They choose to enter the killing zone and they need to understand and be warned that people who choose to kill and be accessories to murder may very well have violence done against them to stop the violence they are perpetrating on human beings in the womb."[107] He predicts that "more violence is inevitable and it is righteous. It wouldn't bother me if every abortionist in the country today fell dead from a bullet."[108] Like other co-defendants, he believed that killing is justified in war and that "there is a war in the womb."[109]

McMillan goes further than most of his co-defendants when he argues that killing a pregnant abortion provider is justified because "if you have to sacrifice an innocent to save many, it would be alright [sic]."[110] He also contends that

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[103] *Planned Parenthood,* 41 F. Supp. 2d at 1135.

[104] *Id.* at 1145.

[105] *Id.* at 1135; *see also id.* at 1145 ("Defendant Treshman organized and sponsored an event at which defendants Bray and Burnett spoke in favor of the use of force."); *id.* at 1141 ("Defendant Burnett himself has been tempted to act violently. He said, 'I would have to say that anybody who's involved in pro-life activism has been, you know, confronted with that possibility.'"). Among other statements supportive of violence on national television and in other public media are those of co-defendants McMillan and Bray who publicly praised the bombing of a Birmingham, Alabama clinic. *Id.* at 1136. The co-defendants also recognize the danger created by some of the radical anti-abortion activity. One co-defendant admitted that as a result of the kind of activities that the defendants have engaged in, "I mean, if I was an abortionist, I would be afraid." He also admitted that he "has been tempted to act violently." *Id.* at 1141.

[106] *Id.* at 1146.

[107] *Id.*

[108] *Id.* at 1147.

[109] *Id.*

[110] *Id.*

killing the President and Supreme Court Justices who support abortion rights is justified.[111]

2. *The Defendants' Conduct Relating to Violence*

Two acts of violence preceded ACLA's split from Operation Rescue. On March 10, 1993, Michael Griffin murdered David Gunn, a doctor who performed abortions in Pensacola, Florida; prior to his death, Gunn was the subject of a "Wanted" poster that included his name, photograph, and other information to identify him.[112] Five months later, Shelley Shannon fired five shots at a Wichita, Kansas doctor, George Tiller, who also performed abortions.[113] Shannon was "a close friend and associate of the defendants."[114] Those shootings precipitated the creation of ACLA because its founders argued that the shootings were justified, a position rejected by Operation Rescue.[115]

A second abortion doctor was murdered in 1993. Prior to his murder, Dr. George Patterson's name, physical description, and address were circulated on copies of a "Wanted" poster.[116] Also prior to the murders of Dr. John Britton and his volunteer escort James Barrett and the attempted murder of June Barrett, James Barrett's wife, Britton's name, photograph, and physical description were reported on an "unWanted" poster.[117] Those posters used language that later appeared on posters on the Nuremberg Files and were created by some of the *Planned Parenthood* defendants. Specifically, the unWanted posters stated that Britton had committed "Crimes Against Humanity. . . . Britton has brutally murdered thousands of unborn babies" and included his home and office addresses, his physical description, a description of his car, including his license number.[118] At least some of the defendants were aware of the posters and the

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[111] *Id.*

[112] *Id.* at 1139.

[113] A TIME TO KILL, *supra* note 46, at 183–84.

[114] *Planned Parenthood,* 41 F. Supp. 2d at 1135 ("Shannon also later pleaded guilty to arson and butyric acid attacks on eight abortion facilities, including Portland Feminist's Eugene Oregon Clinic.").

[115] *Id.* at 1136.

[116] *Id.* at 1134.

[117] *Id.* at 1135.

[118] *Id.; see also* Plaintiff's Memorandum, *supra* note 51, at 7–8.

> As reported in detail in the September 1993 issue of *Life Advocate,* Hill, Burt, Gratton and Murray cased the clinic, waiting for an opportunity to snap Dr. Britton's picture. Hill had a camera and managed to get a picture of the doctor, but his name was still unknown. Later in the evening, Murray got Dr. Britton's license plate number which he quickly phoned in to another Burt associate who ran the license plate number to reveal Dr. Britton's identity. The *Life Advocate* article published by defendants concluded as follows: "John Burt is currently working on an unwanted poster 'exposing this man for the butcher that he is,' and making vital information about him available to the public."

possibility that the posters contributed to violence against abortion providers. For example, Bray reported favorably on Burt's efforts to circulate the Britton poster in Bray's magazine.[119]

Those crimes inspired further activity by ACLA. Prior to the murders, co-defendants Catherine Ramey and Andrew Burnett visited John Burt, creator of the Dr. Gunn poster and co-creator of the Dr. Britton poster. He prepared the Britton poster with Britton's murderer, Paul Hill. As found by the district court in *Planned Parenthood*, Ramey, Burnett, Hill and Burt "discussed 'wanted' posters at this meeting."[120]

After Ramey and Burnett's visit to Florida and after the murders of Gunn and Britton, several co-defendants in *Planned Parenthood* helped create a document called the "Deadly Dozen" poster,[121] modeled on the "Wanted" posters. While the poster was in the planning stages, John Salvi murdered two people and wounded five others, all of whom worked in abortion clinics in Brookline, Massachusetts.[122] Salvi drove immediately to Norfolk, Virginia, where co-defendant Crane lived.[123] Salvi fired gunshots into a clinic there where Crane had often protested.[124] A month earlier, Crane was quoted in *Life Advocate* about his belief that the prior murders had led to the decision of a number of abortion doctors to quit.[125] The article also identified the Hillcrest Clinic.[126] Crane later speculated that Salvi was drawn to Norfolk by publications like the *Life*

> Burt, Gratton and Murray then traveled across the state to Fernandina Beach, where Dr. Britton lived, and took pictures of his house and the building in which his private practice was located. With the information they obtained through Dr. Britton's license plate number and the photographs, they prepared a poster that read across the top, "unWANTED John Bayard Britton."

Id. (citations omitted).

[119] *See* Plaintiff's Memorandum, *supra* note 51, at 8–9.

> . . . Burnett testified that he could "neither affirm or deny" that he knew at least as of September 1994 that there were posters for Dr. Gunn and Dr. Britton prior to their deaths. Defendants McMillan and Mears candidly admitted having knowledge of this fact. Most claimed not to recall the precise sequence of events.

Id. (citations omitted).

[120] *Planned Parenthood*, 41 F. Supp. 2d at 1135 ("Hill and Burt were videotaped taking photographs for the poster of Dr. Britton.").

[121] *Id.* at 1153 ("[E]ach defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster.").

[122] *Id.* at 1135–36.

[123] Plaintiff's Memorandum, *supra* note 51, at 21.

[124] *Planned Parenthood*, 41 F. Supp. 2d at 1136.

[125] Plaintiff's Memorandum, *supra* note 51, at 21.

[126] *Id.*

Advocate.[127] The possibility that the campaign in support of violence against abortion providers was inspiring people like Salvi did not deter ACLA from its decision to publish its poster.[128]

ACLA first published the Deadly Dozen poster on January 22, 1995, in the Washington, D.C. area.[129] Co-defendants republished it in various settings

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[127] *See id.* at 21–22 ("Salvi was apprehended and arrested in Norfolk and held in the local jail for several days. Crane and his associate Donald Spitz—whose name and phone number reportedly were in Salvi's possession at the time of his arrest—attended a vigil at the jail in support of Salvi.").

[128] *See id.* ("The planning occurred at a meeting of the ACLA leadership held in Bowie, Maryland at Bray's parents' home, and through a series of conference calls among many of the defendants in the late fall of 1994. Bray, Burnett, Crane, Dodds, Miller, Foreman and Murch attended the Maryland meeting."); *see also id.* at 25.

> David Lane had attended the January 1995 events where he "got in with the ACLA group." He returned from the ACLA event with a copy of Michael Bray's book, *A Time to Kill*, and in short order attacked a Planned Parenthood clinic. Lane received a 15-year prison sentence for the clinic attack.

Id.

[129] *See Planned Parenthood*, 41 F. Supp. 2d at 1131 ("The Deadly Dozen poster . . . is a true threat to bodily harm, assault, or kill one or more of the plaintiffs. . . . The Deadly Dozen poster was created by the American Coalition of Life Activists ('ACLA') and first published in or around Washington, D.C. on January 22, 1995."); *id.* at 1138 ("Defendant Bray attended the ACLA planning meeting in Bowie, Maryland in November 1994."); *id.* at 1141–42.

> Defendant Burnett attended the ACLA planning meeting where the Deadly Dozen poster was discussed, in Bowie, Maryland in November 1994. . . . Defendant Burnett participated in an ACLA conference call prior to the January 1995 meeting, to plan the Deadly Dozen poster. . . . Defendant Burnett provided the names and addresses of Drs. Elizabeth and James Newhall and Dr. George Kabacy for the Deadly Dozen poster and helped prepare the poster. . . . Defendant Burnett also asked Paul deParrie to provide names for the list.
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> . . . .
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> . . . Defendant Crane attended the ACLA organizational meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. . . . Defendant Crane participated in the ACLA conference call to plan the Deadly Dozen poster. . . . Defendant Crane prepared the Deadly Dozen poster and solicited names and other information for the poster from other defendants. . . . Defendant Crane unveiled the Deadly Dozen poster at the ACLA event in January 1995 in blown-up form. . . . Defendant Crane and ACLA republished the Deadly Dozen poster on several occasions after learning that the physicians on the list had been provided U.S. Marshal protection after the poster was published.

Id. (citations and some paragraph structure omitted). *Id.* at 1143 ("Defendant Dodds attended the ACLA meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. . . . Defendant Dodds participated in the ACLA conference call to plan the Deadly Dozen poster. . . . Defendant Dodds provided Dr. George Tiller's name for the Deadly Dozen poster."); *id.* at 1144 ("Defendant Dreste approved of the Deadly Dozen poster. Dreste regretted that Dr. Robert Crist was not one of the doctors named on the poster."); *id.* at 1145 ("Defendant Forman attended the ACLA organizational meeting in Bowie, Maryland in November 1994."); *id.* at 1146 ("Defendant McMillan provided the name of Dr. Joseph Booker to David Crane for the Deadly Dozen poster."); *id.* at 1147 ("Defendant Murch provided the names and addresses

thereafter.[130] The document resembled the "Wanted" posters in important essentials.

The poster listed the names of thirteen abortion providers and included the addresses for some of the physicians.[131] The poster listed Dr. Tiller's name and address. He had been shot over a year earlier.[132] Some of the information listed in the poster had been published earlier by *Life Advocate*, ALM's magazine.[133] Tiller's assailant, Shelley Shannon, who had participated in protests of Tiller's clinic along with two co-defendants in *Planned Parenthood* and a close friend of the defendants, had copies of *Life Advocate* with information about Tiller when she shot him.[134] Not only was Shannon a friend of a number of the defendants, but she corresponded with Bray and admitted that she was inspired to commit violent acts by *A Time to Kill*.[135] After the shooting, Bray stated that Shannon had shown "excessive restraint" when she wounded Tiller and invoked the Fifth Amendment when he was asked whether he knew of her plan to shoot Tiller in advance of the act.[136]

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of the two doctors from the Northeast region for the Deadly Dozen poster.... Defendant Murch republished the Deadly Dozen poster in his newsletter *Salt & Light* after being made aware that physicians on this poster had been provided U.S. Marshal protection. He circulated his newsletter with the Deadly Dozen poster to 700 people."); *id.* at 1149 ("Defendant Stover attended the ACLA planning meeting in Bowie, Maryland in November 1994."); *id.* at 1150 ("Defendant Treshman provided the name of Dr. Douglas Karpen for the Deadly Dozen poster."); *id.* at 1151 ("Defendant Wysong provided defendant Crane with names of physicians for the Deadly Dozen poster."); *id.* at 1152 ("DeParrie, at defendant Burnett's request, provided names of doctors for the Deadly Dozen poster.").

[130] *Id.* at 1132 ("Defendant Advocates for Life Ministries ('ALM') republished the poster in its magazine *Life Advocate*. Defendant Murch republished the poster in his publication, *Salt & Light*. Defendants also republished the poster at later ACLA events.").

[131] *Id.*

[132] *Id.*

[133] *See id.* at 1132, 1137–38.

[134] *Id. See also* Plaintiff's Memorandum, *supra* note 51, at 14 ("In the meanwhile, a housewife from Grants Pass, Oregon, Rachelle 'Shelley' Shannon—who had worked with Portland-based defendants ALM, Burnett, Ramey and Stover and corresponded with defendant Bray—had embarked on a spree of clinic bombings, arsons and butyric acid attacks against ten West Coast clinics.").

[135] Plaintiff's Memorandum, *supra* note 51, at 13–14.

[136] *See id.* at 14 & n.6.

> After Shannon's arrest, investigators also found an anonymous booklet buried in her backyard called the "Army of God Manual"—a users instruction booklet on bombing, burning and vandalizing abortion clinics, and on injuring and maiming abortion providers. They also found Bray's book. Defendants have possessed or at least seen this "how-to" manual.

Id. at 14 n.6. *See also Nightline Broadcast, supra* note 92 (explaining that Michael Bray was behind a series of ten clinic bombings, and a sign reading A.O.G. was found in front of one of those clinics).

The Deadly Dozen poster's heading stated "GUILTY of Crimes Against Humanity," and mentioned the 1945–46 Nuremberg trials. After listing the names, addresses, and telephone numbers of the twelve doctors, the poster offered a five thousand dollar reward for "information leading to arrest, conviction and revocation of license to practice medicine" of those named.[137] ACLA republished the Deadly Dozen poster for several months, including the poster in its mailings.[138] ALM republished the poster in its magazine in 1995 as well.[139]

In August, 1995, ACLA released additional posters, each naming one doctor or reproductive health care clinic.[140] The information included was similar to that found in the Deadly Dozen poster. For example, the poster identifying co-plaintiff Dr. Crist included large type accusing him of being "GUILTY OF CRIMES AGAINST HUMANITY."[141] The poster included his home and work addresses. Below his photograph, the poster stated that Crist was a "notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services. . . . He also sometimes kills women."[142] The poster requested that people contact him to persuade him to give up performing abortions. The poster contained the words "$500 REWARD" and "ABORTIONIST" in large print, followed by ACLA's name and address.[143] Law enforcement also took the Crist poster seriously.[144]

Subsequently, ACLA members produced six "Guilty" posters, targeting three doctors and three reproductive health care clinics in August 1995. The posters targeted St. Louis area abortion providers and were issued during an ACLA

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[137] Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

[138] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1137 (D. Or. 1999).

[139] *Id.* ("ALM republished the Deadly Dozen poster in the March 1995 issue of *Life Advocate*."). Law enforcement took the Deadly Dozen poster seriously. An F.B.I. representative warned the doctors whose names appeared on the poster that they needed to take safety precautions. The F.B.I. also offered 24 hour a day protection for the doctors and their families. Other law enforcement agencies also contacted the doctors. Obviously, law enforcement officials believed that the poster would incite violence. *Id.* at 1132.

[140] *Planned Parenthood,* 23 F. Supp. 2d at 1186.

[141] *Id.* at 1187.

[142] *Id.*

[143] *Id.*

[144] *See* Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1133 (D. Or. 1999); *see also* Plaintiff's Memorandum, *supra* note 51, at 30.

> [Crist] was particularly frightened by the poster in light of the fact that two ACLA leaders who had harassed him for years, Dreste and Treshman, were behind the poster campaign. While speaking at the event, Dreste threatened that he would do *whatever is necessary* to stop Dr. Crist from performing abortions.

Id.

conference held in St. Louis. The posters were similar to the Deadly Dozen poster and included a caption "CRIMES AGAINST HUMANITY," with a line across the bottom indicating that the target of the poster was an "ABORTIONIST" or an "ABORTUARY."[145] The posters listed the doctors' work and home addresses and photographs (or in one case, a sketch) of the featured doctor or clinic. The posters included additional inflammatory language.[146]

The Nuremberg Files grew out of these earlier activities. Co-defendants David Crane and Andrew Burnett organized the project with Paul deParrie.[147] The files were unveiled at a January 1996 ACLA meeting and were approved by several of the co-defendants.[148] When first presented, the files consisted of a box filled with personal information about abortion doctors.[149] Later, deParrie gave Horsely twenty-two files that Horsely posted as a sub-site on his Christian Gallery website.[150]

Like the Deadly Dozen and Crist poster, the Nuremberg Files post-date the murders of a number of abortion doctors. As found by the district court, the co-defendants knew about the murders of the various doctors and the appearance of their names on Wanted posters when they published their various posters and when they began the Nuremberg Files.[151] According to the district court, the defendants "Released Their Threats into a Known Atmosphere of Violence Against Abortion Providers."[152] Not only did ALM chronicle the continuing violence against abortion providers in its magazine,[153] but various co-defendants were present at abortion clinics around the time that violence took place there. Furthermore, they made frequent, highly publicized statements supportive of those who committed violent acts.[154]

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[145] Plaintiff's Memorandum, *supra* note 51, at 29.

[146] *Id.* at 30.

[147] *See id.* at 31.

[148] *Id.* at 32.

[149] *Id.*

[150] *Id.* at 33.

[151] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1134 (D. Or. 1999) ("By January 1995, defendants knew of the murder of Dr. David Gunn and of the posters that preceded his death."); *id.* ("Defendant knew of the murder of Dr. Patterson and the poster that preceded it."); *id.* at 1135 ("By January 1995, defendants were aware of the murder of Dr. Britton and the posters that preceded it."); *id.* ("By January 1995, defendants were aware of the shooting [of Dr. Romalis] as well.").

[152] *Id.* at 1134.

[153] *Id.* at 1135.

[154] *See id.*, at 1135–36.

In August 1993, just two days prior to the murder of Dr. Patterson, Dr. George Tiller was shot in both arms by Shelley Shannon. Shelley Shannon was a close friend and associate of the defendants. Shannon also later pleaded guilty to arson and butyric acid attacks on eight abortion facilities, including Portland Feminist's Eugene, Oregon clinic.

E. *The Death Toll*

Most of the murders of abortion doctors and security personnel preceded ACLA's activity that formed the basis of the *Planned Parenthood* litigation. Nonetheless, all of those killed or wounded since March 10, 1993, were listed on the Nuremberg Files with their names crossed out, if killed, or marked in gray, if wounded. That list included doctors David Gunn (killed March 10, 1993), George Tiller (wounded August 19, 1993), George Patterson (killed August 21, 1993),[155] John Britton (killed July 1994), Garson Romalis (wounded November 1994), Hugh Short (wounded November 10, 1995), and Jack Fainman (wounded November 11, 1997); it also includes several clinic employees, a police officer, and volunteer security personnel: James Barrett (killed July 29, 1994), June Barrett (wounded July 29, 1994), Shannon Lowney and Leann Nicols (killed December 30, 1994), Anjana Angrawal, Jayne Sauer, Richard J. Seron, Antonio

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> In November 1994, in Vancouver, Canada, Dr. Garson Romalis, an abortion provider, was shot by a sniper with a high-powered rifle at close range. He was having breakfast in his home at the time.
>
> By January 1995, plaintiffs were aware of the sniper shooting of Dr. Romalis.
>
> By January 1995, defendants were aware of the shooting as well. Defendant Treshman praised the shooting of Dr. Romalis on national television, stating, "I would say that that was certainly the superb tactic. It was certainly far better than anything that was seen in the States because the shooting was done in such a way that the perpetrator got away. I would think more abortionists should quit as a result of it."
>
> Soon thereafter, on December 30, 1994, John Salvi murdered two clinic workers and wounded five others at two clinics in Brookline, Massachusetts. One of the clinics in Brookline was a Planned Parenthood clinic.
>
> Immediately following the shootings in Massachusetts, Salvi drove to Norfolk, Virginia and fired shots into the windows of the Hillcrest Clinic in Norfolk.
>
> Defendant David Crane was present outside of the Hillcrest Clinic on the morning John Salvi fired the shots.
>
> Defendant Michael Bray had been convicted and served four years in federal prison for conspiracy to bomb seven abortion facilities including the Hillcrest Clinic.
>
> More physicians who perform abortions in Canada have been shot by snipers since the sniper shooting of Dr. Romalis.
>
> In January 1998, a bomb in Birmingham, Alabama killed an off-duty police officer and maimed a nurse who worked at the clinic.
>
> Defendant McMillan referred to the Birmingham bombing as "a righteous act." Defendant Bray likewise defended this violence on national television.
>
> In October 1998, in his home outside of Buffalo, New York, Dr. Barnett Slepian, a doctor who performed abortions, was shot and killed by a sniper.
>
> Dr. Slepian's name is crossed out on the Nuremberg Files website.
>
> Violence against abortion providers has continued through today.

Id. (citations and paragraph numbering omitted).

[155] On the Internet Freedom version of the website, there was no listing of Dr. George Patterson, but there was a Wayne Patterson with a question mark next to the state and a line through the name. *Nuremberg Files, supra* note 6.

Hernandez and Brian Murray (wounded December 30, 1994), Robert Sanderson (killed January 29, 1998), and Emily Lyons (wounded January 29, 1998).[156]

One doctor of special interest, Dr. Barnett Slepian, an abortion provider in upstate New York, was murdered on October 23, 1998. Prior to his death, his name was listed on the Nuremberg Files.[157] Horsley crossed out Slepian's name on the Nuremberg Files within hours of his murder.[158] In June 1999, a New York grand jury indicted James Kopp, an anti-abortion activist with ties to the defendants, for this murder.[159]

III. FIRST AMENDMENT CASE LAW

A criminal defendant exhorts an associate to commit a crime and provides the associate with information to help locate his victim. No criminal defense lawyer in the United States would urge that the defendant's speech—and indeed in the hypothetical, the defendant has engaged in nothing but speech—is entitled to First Amendment protection. Arguably, at least some of the *Planned Parenthood* defendants did just that. In the Nuremberg Files and elsewhere, their rhetoric has encouraged violence against abortion providers, and the personal information in the Files and on the unWanted posters may provide actual aid to would-be assassins. Despite that, First Amendment advocates have asserted that the defendants are entitled to speech protection.

Concern about sanctioning the *Planned Parenthood* defendants is legitimate. The *Planned Parenthood* defendants' message is certainly unpopular. Not only do they challenge the legality and morality of abortion, an opinion not shared by a majority of Americans,[160] but they also advocate violence, in contravention of the

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156 *Id.*

157 *See Planned Parenthood,* 41 F. Supp. 2d at 1136 ("Dr. Slepian's name is crossed out on the Nuremberg Files website.").

158 *See* Viele, Newspaper Article, *supra* note 19 ("Horsley says someone notified him of the shooting, an event quickly confirmed by TV reports, he says. Only after seeing reports on TV did he strike through Slepian's name, he says.").

159 Shirley E. Perlman, *Indictment in Slepian Slaying; FBI concedes anti-abortion activist at large,* NEWSDAY, June 25, 1999, at A24; *see also Roughly 300 protesters demonstrated loudly but peacefully Wednesday. . . .*, LETHBRIDGE HERALD, Apr. 8, 1999, at 6., *available at* 1999 WL 14898252.

> Joan Andrews Bell, [a speaker at Human Life International conference, a U.S. based organization that promotes chastity, family life and the rights of the unborn], has a lengthy criminal record in the U.S., including burglary, related to protests at abortion clinics. Bell is also reportedly a colleague of James Kopp.

Id. Additionally, co-defendant Treshman, is "HLI's spokesman."

160 THE GALLUP POLL MONTHLY, Aug. 1996, at 33; THE GALLUP POLL, Aug. 28, 1980, at 171 (Survey 159-G); May 31, 1981, at 112 (Survey 173-G); July 31, 1983, at 142

law of every state in the country,[161] based on questionable Biblical and moral teaching.[162] But that is the very kind of case in which courts must exercise careful scrutiny to be sure that First Amendment values are upheld.[163] At the same time, the defendants' message also represents a threat to human life, and as such, may not be entitled to First Amendment protection.[164]

At trial, the defendants attempted to bring their case within the protection of the First Amendment.[165] In response to the defendants' motion for summary judgment, the plaintiffs argued that the case involved "true threats."[166] The district court agreed with the plaintiffs.[167] However, whether their conduct actually amounted to true threats is currently before the Ninth Circuit,[168] and has already been the subject of scholarly attention.[169]

(Survey 217-G); *see also* Michael Vitiello, *How Imperial is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will,* 34 U.S.F.L. REV. 49 (1999).

[161] The claim that necessity justifies killing abortion providers finds no support in the law. While the Model Penal Code would allow killing under the general necessity provision, MODEL PENAL CODE § 3.02 (1974), states have not allowed necessity as a defense to homicide. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 22.02 (2d ed. 1995). Even under the Model Penal Code, the defense would be unavailable if allowing the defense would be contrary to legislative intent. *Id.* at § 22.05; *see also* MODEL PENAL CODE § 3.02(1)(C) (1974) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: . . . a legislative purpose to exclude the justification claimed does not otherwise plainly appear."). That a state would allow the murder of an abortion provider for conduct that is lawful is sheer fantasy.

[162] *See 60 Minutes II Broadcast, supra* note 80 ("Rev. Dowhower: What worries me most is that the word of God is misrepresented, that God is portrayed as this vengeful moral absolutist who has made the eradication of abortion the all-important issue. The all-important issue is God's love, not his vengeance.").

[163] *See* Whitney v. California, 274 U.S. 357, 377 n.5 (1927) (Brandeis, J., concurring) ("You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous.").

[164] *See infra* Part IV.

[165] Planned Parenthood v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1189 (D. Or. 1998).

[166] Plaintiff's Memorandum, *supra* note 51, at 57–59.

[167] *See* Planned Parenthood v. Am. Coalition of Life Activists, 945 F. Supp. 1355, 1372 (D. Or. 1998).

[168] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999), *appeal docketed,* No. 99-35405 (9th Cir. Apr. 23, 1999). *See also* Howard Mintz, *Anti-Abortion Website likely protected under First Amendment,* SAN JOSE MERCURY NEWS, Sept. 13, 2000, *available* at LEXIS, News Library, San Jose Mercury News.

[169] *See generally* Noffsinger, *supra* note 38 (discussing the *Planned Parenthood* decision and proposing a "synthesized test under which juries first would apply a four-part definition to distinguish threats from political advocacy, and second determine whether the speech poses a likelihood of imminent violence"); *see also* Gey, *supra* note 38; Richards, *supra* note 38, at 292–93.

Because the case came within the *Watts* line of cases, the court did not have to address a different issue, whether the threatened harm to abortion providers was sufficiently imminent to allow the speech to be sanctioned.[170] As argued by the plaintiffs in opposition to the defendants' motion for summary judgment, *Brandenburg* applies in cases in which a speaker encourages a third party to engage in lawless conduct, while *Watts* applies when a defendant directs a threat towards another person.[171]

Much of the debate in *Planned Parenthood* turns on whether the trial court's use of an objective standard, rather than a subjective standard, was appropriate.[172] That debate is beyond the scope of this article. Instead, this article addresses the question that the district court did not have to answer: whether, even if the defendants' conduct did not amount to true threats, they nonetheless could be punished for incitement to violence. Whether such a prosecution would violate the First Amendment turns on the proper interpretation of *Brandenburg v. Ohio* and its progeny.[173] To understand that line of cases, this section begins with earlier case law applying the Court's clear and present danger test and the Holmes-Brandeis dissenting opinions.[174] Although not without debate, *Brandenburg* vindicated their earlier position;[175] therefore, the dissents of Holmes and Brandeis may shed light on the correct application of the Court's current approach to the issue. Thereafter, this section reviews *Brandenburg* and the limited case law applying its test.[176] This section also reviews Learned Hand's opinion in *Masses Publishing Co. v. Patten*[177] because as demonstrated by

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> The messages on the Nuremberg files site contained no explicit threat of, or direct incitement to, violence, raising the question of whether new remedies were indeed construed by the jury in its application of this law. If no explicit threat was made against abortion doctors on the web page, the question becomes why did the jury reach its conclusion and award such a massive amount of damages?
>
> ....
>
> The magnitude of the verdict arguably reflects the jury's discomfort with or perhaps apprehension of the internet as a communications medium.

Id.

[170] Richards, *supra* note 38, at 293.

[171] Plaintiff's Memorandum, *supra* note 51, at 57–58.

[172] Viele, Newspaper Article, *supra* note 19.

[173] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[174] *See infra* Part III.A.

[175] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 616 (1978); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975); David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1233–34.

[176] *See infra* Part III.C–D.

[177] 244 F. 535 (S.D. N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

Professor Gunther, Hand's opinion was the other major influence on the Supreme Court's modern incitement cases.[178]

A. *The Early Precedent*

The Supreme Court's early cases relating to political dissent almost uniformly upheld, upon a minimal showing, the federal and state governments' authority to prosecute speech advocating unpopular causes.[179]

In *Schenck v. United States*,[180] the defendants mailed pamphlets to draftees during wartime. The circulars argued in "impassioned language" that the draft was unconstitutional and that the draftees should "assert [their] rights" to resist conscription.[181] The government prosecuted the defendants under the Espionage Act of 1917, which made criminal an attempt to obstruct the draft or cause insubordination in the military.[182]

The government contended that the pamphlets alone amounted to an attempted crime, even absent a showing of actual interference with the war effort.[183] A unanimous Supreme Court upheld the defendants' convictions.[184] Justice Holmes framed the issue as "whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent."[185] The Court left for the jury the job of determining whether the evidence was sufficient to show a clear and present danger that the circulars could have the natural effect of persuading draftees to resist conscription.[186]

A second example further demonstrates that the clear and present danger test as then conceived by the Court offered little constitutional protection. Perhaps the most startling case to those who grew up in the Vietnam Era when anti-war dissent was open, frequent, and raucous, is *Debs v. United States*.[187] The Supreme Court affirmed Debs' conviction for what amounted to an antiwar speech against a challenge that the evidence was insufficient.[188] The Court upheld

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[178] Gunther, *supra* note 175, at 722.

[179] *See infra* Part III.A–B.

[180] 249 U.S. 47 (1919).

[181] *Id.* at 51.

[182] Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a) (1994)).

[183] *Schenck*, 249 U.S. at 49.

[184] *Id.* at 53.

[185] *Id.* at 52.

[186] *Id.*

[187] 249 U.S. 211 (1919).

[188] *Id.* at 213–14.

the jury's determination that the "natural and intended effect" of Debs' speech was to frustrate the war effort.[189]

Holmes, during the 1920 Court Term, for the first time, joined by Brandeis, began to dissent from the Court's restrictive view of the First Amendment. In *Abrams v. United States*,[190] five Bolshevik sympathizers dropped leaflets onto the streets of New York. The leaflets opposed the United States' support of anti-Soviet forces in the Russian revolution and called for a strike to prevent shipments of weapons to those forces.[191]

The Supreme Court affirmed the five defendants' convictions under the Espionage Act, which was amended in 1918 to make it an offense to urge curtailment of military production with intent to hinder the war with Germany.[192] The Court overcame the obvious problem, that the defendants' intent was not to hinder the war effort against the Germans, by imputing knowledge to the defendants that strikes preventing war production would necessarily harm the war effort against the Germans.[193]

> The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class .... He said that he had to be prudent and might not be able to say all that he thought ... but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.
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> ... [H]e took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to Socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court. ... The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring peace. "You have your lives to lose; you certainly ought to have the right to declare war if you consider a war necessary." The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

Id.

[189] *Id.* at 215.

[190] 250 U.S. 616 (1919).

[191] *Id.* at 620–23.

[192] *Id.* at 624; Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (as amended by Act of May 16, 1918, ch. 75, 40 Stat. 553 (repealed 1948).

[193] *Abrams*, 250 U.S. at 621–22.

Holmes, the author of *Schenck*'s clear and present danger test, sought to vitalize the test, perhaps for the first time with the intent to make the test protective of the First Amendment values.[194] His dissent argued that the First Amendment prevented Congress from forbidding "all efforts to change the mind of the country."[195] As a result, he urged that the First Amendment required the government to show a specific intent to cause a harm that Congress has the power to prevent. Holmes read the statute as comporting with the specific intent requirement, but also found the evidence of the defendants' intent insufficient to support their conviction.[196]

Holmes also argued that the evidence was insufficient because, even if the leaflets were treated as an attempt to obstruct the war effort, the danger of the feared obstruction was not sufficiently clear and present.[197] That is quite similar to the criminal law of attempt,[198] where a court must recognize a line between mere intent to commit harm accompanied by an innocent act, and intent plus a sufficient act demonstrating actual harm. Here, the feared obstruction was not sufficiently imminent.[199]

While commentators have focused on the ambiguity in Holmes' dissent,[200] *Abrams* is best understood when it is viewed along with other dissenting or concurring opinions by Holmes and Brandeis. For example, in *Whitney v. California*, the Supreme Court upheld the conviction of Anna Whitney for participating in a meeting of the Communist Labor Party Convention.[201] The party declared itself to be in "full harmony with 'the revolutionary working class

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[194] The extent to which Holmes had a change of philosophy has been the subject of much debate. *E.g.*, G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982).

[195] *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

[196] *Id.* at 628–29 (Holmes, J., dissenting); *see also* Dow & Shieldes, *supra* note 175, at 1227 (arguing that although Holmes claimed in *Abrams* to be using the clear and present danger test, he actually "tightened it."). As noted by Dow & Shieldes,

> As he [Holmes] put it: I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States may constitutionally seek to prevent.

Id.

[197] *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

[198] DRESSLER, *supra* note 161, § 27.

[199] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[200] TRIBE, *supra* note 175, at 611; White, *supra* note 194, at 433–42; Dow & Shieldes, *supra* note 175, at 1229–30; Gunther, *supra* note 175, at 742–43.

[201] Whitney v. California, 274 U.S. 357, 372 (1927).

parties of all countries'" and had as its purpose "to create a unified revolutionary working class movement in America."[202] After the party adopted its resolution, Whitney, "without, so far as it appears, making any protest, remained in the convention until it adjourned."[203] Despite her continued attendance, she denied that she intended the party to "be an instrument of terrorism or violence."[204] She was convicted of criminal anarchy and criminal syndicalism.[205]

Most troubling to Brandeis and Holmes was the fact that the syndicalism statute made advocacy a crime.[206] Under the California statute, the prosecutor did not have to demonstrate that the result advocated (the overthrow of the capitalist system, for example) was imminent, that is, that it was a clear and present danger.[207] The Court deferred to the legislative determination, in enacting the statute, that danger inhered in advocacy.[208] In effect, the syndicalism act, as applied, was a rational exercise of state police powers.[209]

In *Whitney,* Brandeis concurred on jurisdictional grounds, but most of his lengthy opinion set out his disagreement with the Court's approach to the First Amendment question.[210] He disagreed that the Court should defer to the legislature's determination of a clear and present danger.[211] After cataloguing the values underlying free speech, Brandeis concluded that "[b]elieving in the power of reason as applied through public discussion, [the framers] eschewed silence coerced by law."[212] While the state may suppress speech that represents serious injury, fear of injury is alone insufficient to justify suppression of speech. Before the state may suppress speech, it must have a reasonable fear of imminent and serious harm.[213]

Brandeis recognized that "[e]very denunciation of existing law."[214] increases the probability that it will be violated. But without imminent harm, speech is protected by the First Amendment.[215] That is so because "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for

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202 *Id.* at 363.

203 *Id.* at 366.

204 *Id.*

205 *Id.* at 359–60.

206 *See id.* at 373 (Brandeis, J., concurring).

207 *Id.* at 371–72.

208 *Id.*

209 *Id.*

210 *Id.* at 372 (Brandeis, J., concurring).

211 *Id.* at 378–79 (Brandeis, J., concurring).

212 *Id.* at 375–76 (Brandeis, J., concurring).

213 *Id.* at 376 (Brandeis, J., concurring).

214 *Id.*

215 *Id.*

full discussion."[216] Here, Brandeis offered his version of the market place of ideas concept introduced by Holmes in *Abrams:* if the harm is not imminent, the solution is education and the remedy is more speech, "not enforced silence."[217]

Brandeis and Holmes articulated a number of important principles in the advocacy-incitement cases. As a matter of substantive rules, the danger that the legislature is authorized to address must be clear and present. That meant that the harm must be imminent. The speaker must also intend to incite the harm. Those rules flow from the purpose of the First Amendment, to protect political dissent and unpopular speech from suppression by the majority.[218]

Two procedural principles emerged as well. First, a legislative determination of a clear and present danger is not binding on the court.[219] A court must determine on its own whether the evidence supports the existence of imminent harm. Second, a court has a greater than normal role in reviewing a jury's determination that harm is sufficiently imminent and that a defendant has a specific intent to bring about the harm. Protection of the First Amendment creates the obligation of independent review of the record.[220]

One other early decision, Learned Hand's opinion in *Masses Publishing Co. v. Patten,*[221] is important for understanding the evolution of modern First Amendment case law. There, the plaintiff, publisher of a revolutionary journal, applied for an injunction, in effect to compel the postmaster to accept its journal for mailing.[222] The postmaster refused to accept the publication because, in his view, the magazine violated the Espionage Act of 1917.[223] Hand did not hold that the act violated the First Amendment. Instead, in construing the statute as inapplicable to *The Masses,* he read the statute to avoid a conflict with the First Amendment.[224]

The postmaster argued that the content of *The Masses,* for example, political cartoons and text expressing the sympathy for conscientious objectors, violated the provision of the act making unlawful "causing insubordination, disloyalty,

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216 *Id.* at 377 (Brandeis, J., concurring).

217 *Id.*

218 *Id.*

219 Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

220 During the period between the end of the red scare after the Bolshevik revolution and the beginning of the Cold War, the Court decided a series of cases that gave more bite to the clear and present danger test. *See* Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling Into the Theoretical Abyss,* 33 GA. L. REV. 1, 12 (1998). In perhaps its strongest articulation of the test, the Court stated that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. 252, 263 (1941).

221 244 F. 535 (S.D. N.Y. 1917), *rev'd,* 246 F. 24 (2d Cir. 1917).

222 *Id.* at 536.

223 Act of June 15, 1917, ch. 30, 40 Stat. 217.

224 *Masses Publ'g Co.,* 244 F. at 535.

mutiny or refusal of duty in the military."[225] The postmaster argued that the magazine aroused discontent with the war and that once the reader became discontented with the war, he would then be more likely to become insubordinate to his superiors.[226] Hand refused to read "cause" so broadly because to do so would lead to suppression of all criticism of existing policies.[227]

In rejecting the postmaster's position, Hand attempted to draw a line between permissible speech and illegal incitement, a line that would resurface later.[228] Hand stated that "[o]ne may not counsel or advise others to violate the law as it stands."[229] That is so because:

> [w]ords are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.[230]

Hand would thus create a per se category of unprotected speech.

For Hand, the line between protected and unprotected speech should be objectively determined from the content of a speech, unlike the line drawn by Holmes and Brandeis which varied depending on the effect that the speech would have.[231] Hence, according to Hand, a speech critical of the war effort, without counseling draft resistance, could not be criminalized even if the listeners were motivated to resist the draft. Political agitation must be distinguished from "direct incitement to violent resistance."[232]

Hand's approach was both more and less protective of speech than the Holmes-Brandeis approach. Hand would leave unprotected the ineffectual speaker who implausibly urged his audience to violate the law.[233] But he would also extend protection to a speaker who intended his words to incite the audience but avoided express incitement.[234]

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225 *Id.* at 539.

226 *Id.*

227 *Id.* at 539–40.

228 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

229 *Masses Publ'g Co.*, 244 F. at 540.

230 *Id.*

231 Gunther, *supra* note 175, at 720–21.

232 *Masses Publ'g Co.*, 244 F. at 540.

233 Gunther, *supra* note 175, at 729.

234 *Id.*

B. *The Smith Act Cases*

Passed in 1940, the Smith Act,[235] like the state anarchy and syndicalism laws, targeted left wing activism.[236] It made unlawful advocating the overthrow of any government in the United States by the use of violence, as well as the publishing of written material advocating or organizing any group which teaches, advocates, or encourages the overthrow of any government in the United States by violence.[237] During the height of the post-World War II fear of international communist domination, prosecutors made frequent use of the Smith Act.[238]

In *Dennis v. United States*, eleven defendants, members of the National Board of the Communist Party, were convicted of violating the Smith Act.[239] The evidence showed that in the course of organizing the Communist Party, the defendants did little more than distribute pamphlets and organize classes to teach communist doctrine.[240] The plurality opinion recognized that the Holmes-Brandeis view had gained acceptance in subsequent cases.[241] But according to Chief Justice Vinson, Holmes and Brandeis did not write their dissents "confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis."[242] Instead of accepting their own clear and present danger test, the plurality relied on Judge Hand's formulation of the test in his opinion for the Second Circuit in the same case.[243] Like his balancing test elsewhere,[244] Hand stated that "the gravity of the 'evil,' discounted by its improbability, justifies [an] invasion of free speech as is necessary to avoid the danger."[245] The perceived harm, the overthrow of the government, was obviously great. That the harm did not result during the period charged in the indictment was not controlling; instead, the plurality pointed out a number of factors that

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235 Smith Act of 1940, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1994)).

236 *See* Dow & Shieldes, *supra* note 175, at 1224 ("Though Congress modeled the statute on state prohibitions of criminal anarchy, the Smith Act was primarily used as a method of punishing Communists during a period of fervent anti-Communist sentiment.").

237 Smith Act of 1940, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1994)).

238 Wells, *supra* note 220, at 15–17.

239 341 U.S. 494, 495 (1951).

240 *Id.* at 497; Wells, *supra* note 220, at 7.

241 *Dennis*, 341 U.S. at 507.

242 *Id.* at 510.

243 *Id.*

244 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (developing a negligence formula based on the balancing of various factors).

245 United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

made the possibility of overthrow sufficiently real to justify early intervention by the government.[246]

Not only did *Dennis* rely on a substantive principle less protective than Holmes and Brandeis's formulation of the clear and present danger test, it also rejected the procedural concerns expressed by Holmes and Brandeis. Specifically, the plurality was willing to take judicial notice of the facts that supported the conclusion that the danger was sufficiently real to allow the government to intervene.[247]

Even as acknowledged by the plurality, before *Dennis*, the Holmes-Brandeis view seemed to emerge as the controlling rule of law.[248] By 1957, fear of the risk of international communism had diminished.[249] While the government continued to bring Smith Act cases after *Dennis*,[250] the Supreme Court began to limit the government's ability to stifle political dissent. In *Yates v. United States*, the Court "reinterpreted" *Dennis* and reversed the conviction of fourteen members of the Communist Party because the jury instructions did not make clear the distinction upon which *Dennis* supposedly relied, a line between advocacy (advocacy of abstract doctrine) and incitement (advocacy of action).[251] While *Yates* turned on statutory construction—that is, the Court concluded that the Smith Act prohibited only advocacy of action—that line surfaced in subsequent cases that began to revitalize the Holmes-Brandeis approach to the First Amendment.[252]

C. Brandenburg v. Ohio

Brandenburg, the leader of a Ku Klux Klan group, invited news reporters to a Klan rally. The prosecutor relied on film footage taken by a cameraman attending the rally. The film showed twelve hooded figures burning a cross.[253] Captured on tape was Brandenburg's speech, including the following remarks:

> We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group

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[246] *Dennis*, 341 U.S. at 510; *see* Wells, *supra* note 220, at 2 (discussing how the plurality perverted the clear and present danger test).

[247] *Dennis*, 341 U.S. at 509.

[248] *See id.* at 507.

[249] Wells, *supra* note 220, at 16–17.

[250] *Id.* at 14.

[251] 354 U.S. 298, 303, 318–19 (1957), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978).

[252] Wells, *supra* note 220, at 2, 16–17.

[253] *Brandenburg*, 395 U.S. 444, 445 (1969).

> to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.[254]

A second film recorded a similar speech also given by Brandenburg.[255]

The issue before the Court did not turn on whether Brandenburg's words were protected by the First Amendment. Instead, the Court held that the state statute, a criminal syndicalism statute virtually identical to the Smith Act and to the California statute, upheld in *Whitney*, was unconstitutional because the statute "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[256] According to the Court, post-*Whitney* decisions

> fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[257]

As discussed below, the Supreme Court has revisited its holding in *Brandenburg* only twice in the past thirty years. Those cases have done little to explain the quoted language.[258] Professor Gerald Gunther has found in that language a combination of the best of Hand's approach in *Masses* and of the Holmes-Brandeis approach. Specifically, according to Professor Gunther, "[u]nder *Brandenburg*, probability of harm is no longer the central criterion for speech limitations. The inciting language of the speaker—the Hand focus on 'objective' words—is the major consideration. And punishment of the harmless inciter is prevented by the *Schenck*-derived requirement of a likelihood of dangerous consequences."[259] Under that view, protection of speech is greater than under either the Hand or Holmes-Brandeis approach. A harmless inciter, unprotected under Hand's approach, is protected because the harm is not

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[254] *Id.* at 446. Some First Amendment advocates read *Brandenburg* too broadly. For example, Professor Gey asserts that "the speaker in *Brandenburg* specifically advocated violence against racial minorities." Gey, *supra* note 38, at 556. As the language quoted in the text makes clear, Brandenburg did no such thing. *Brandenburg* would be a far more powerful precedent if the speaker did, in fact, specifically advocate violence against racial minorities, especially if the Court had concluded that, despite such direct advocacy, the evidence was insufficient to convict the speaker. As the text makes clear, *Brandenburg* made no holding on the sufficiency of the evidence and held only that the statute was unconstitutional because it criminalized mere advocacy. *Brandenburg*, 395 U.S. at 449.

[255] *Id.* at 447.

[256] *Id.* at 449.

[257] *Id.* at 447.

[258] *See infra* Part III.D.

[259] Gunther, *supra* note 175, at 755.

sufficiently imminent.[260] But absent expressly inciting language, a speaker retains the First Amendment protection under the approach in *Masses*.[261]

The conclusion that *Brandenburg* adopted Hand's objective approach ignores some of the Court's language. For example, the Court states that the First Amendment protects a speaker unless the speaker's advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[262] Here, the Court seems to have intentionally borrowed Hand's language of incitement and so would appear consistent with Hand's objective test in *Masses*.[263] For Hand, incitement meant terms that specifically called for unlawful conduct.[264] Having invoked Hand's incitement language, the Court went further to suggest that one who did not incite, but nonetheless had the purpose of "producing" imminent harm, may also be criminalized.[265]

The Court's "producing" language may have been redundant, and merely means "inciting."[266] But that is doubtful. Instead, the Court may well have intended the language to cover the situation in which the speaker's intent to bring about the harm was clear, but not necessarily from the express language of the speech. To borrow Professor Chafee's example, Marc Antony avoided making explicit incitement to avenge Caesar's assassination.[267] But any reasonable listener would have understood that to be his message. Presumably, under Hand's approach, Antony would be protected by the First Amendment because he did not

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260 *See supra* notes 233–34 and accompanying text.

261 *Id.*

262 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

263 *See* Gunther, *supra* note 175, at 754–55.

264 *See id.* at 721 ("[I]f the language used was solely that of direct incitement to illegal action, speech could be proscribed; otherwise, it was protected.").

265 *Brandenburg*, 395 U.S. at 447.

266 That would appear to be implicit in Professor Gunther's important discussion of Learned Hand's influence on the Court's test in *Brandenburg*. In asserting that *Brandenburg* vindicates Hand's position, he does not consider the meaning of words that are intended to produce harm and concludes, instead, that "[t]he inciting language of the speaker—the Hand focus on 'objective' words—is the major consideration." Gunther, *supra* note 175, at 755. *But see* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1176 (1982).

> The *Hess* Court relied on the *Brandenburg* "inciting or producing imminent lawless action" language. This may indicate that in *Brandenburg* it had indeed intended to adopt a standard of temporal imminence. The defendant's statement was so clearly not 'advocacy' of anything, however, that it is difficult to be sure whether the court believed that the lack of immediacy was dispositive.

Id.

267 Gunther, *supra* note 175, at 729 n.41 (letter from Zechariah Chafee Jr. to Learned Hand).

use words of direct incitement.[268] By contrast, the Court also allows criminalization if the speaker whose advocacy is "directed" to "producing" imminent lawless activity. Indeed, as long as a state has evidence of the speaker's intent,[269] extending First Amendment protection to a wily and effective speaker[270]—one who simply avoids a direct call to action—protects a dangerous and culpable offender.[271] Thus, contrary to Hand's view, *Brandenburg* does not make words of incitement a necessary condition for the state to criminalize a dangerous speaker, as long as the evidence makes clear the speaker's intent to bring about the harm.

This view, that words of incitement are not a necessary condition, is consistent with the criminal law generally. Words may constitute part of a number of crimes. Conspiracy,[272] aiding and abetting where the offender aids by encouraging the conduct,[273] and solicitation[274] all may involve one offender whose primary criminal conduct is speech. For example, a person may be a co-conspirator based only upon her agreement that one of the participants commit a

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[268] Hand's approach had the advantage of certainty, not subject to

> the mercy of fact-finders reflecting majoritarian sentiments hostile to dissent. . . . [Hand] urged, in *Masses* and for several years thereafter, the adoption of a strict, 'hard,' 'objective' test focusing on the speaker's words: if the language used was solely that of direct incitement to illegal action, speech could be proscribed; otherwise, it was protected.

Id. at 721. But as noted by Professor Gunther, Hand's approach had problems:

> As contemporaries recognized, it could not easily deal with the indirect but purposeful incitement of Marc Anthony's [sic] oration over the body of Caesar. Although Hand recognized that advocacy could be accomplished by 'indirection,' he insisted on starting with the "literal meaning" of the words and never completely explained how far beyond he was willing to go.

Id. at 729.

[269] *Brandenburg*, 395 U.S. at 447–48 (1969); Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

[270] N.Y. Times v. Sullivan, 376 U.S. 254, 285 (1964); *cf.* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 486 (1984).

[271] As indicated by Professor Gunther, Hand "insisted on starting with the 'literal meaning' of the words" and while he may have been willing to go beyond the "objective" language, Hand "never completely explained how far beyond he was willing to go." Gunther, *supra* note 175, at 729. Despite Hand's recognition of the social harm posed by the indirect inciter, that alone was not enough to criminalize the speaker. *Id.* at 728.

[272] MODEL PENAL CODE § 5.03 (1974). In some jurisdictions, a conspiracy may be complete upon an agreement without any overt act. DRESSLER, *supra* note 161, § 29.04 [D] ("A common law conspiracy is complete upon formation of the unlawful agreement. No act in furtherance of the conspiracy is required.")

[273] MODEL PENAL CODE § 2.06(3)(a)(ii) (1974); DRESSLER, *supra* note 161, § 30.09 [B][2][a] ("For example, if *S* a merchant, sells dynamite to *P*, with knowledge that *P* intends to use the explosives to blow open a safe, *S* is not an accomplice in the subsequent crime, unless it was his conscious object to facilitate the commission of the offense.").

[274] MODEL PENAL CODE § 5.02(1) (1974); DRESSLER, *supra* note 161, § 28.03[A].

crime. But nowhere does the criminal law require any express formula before a person may be held liable. Thus, a conspirator may be found guilty based on an implied agreement.[275]

Although *Brandenburg* does not explicitly adopt the Holmes-Brandeis position, the Justices' influence is obvious. At a minimum, the Court's insistence that harm be imminent appears to incorporate their interpretation of the clear and present danger test.[276] Subsequent Supreme Court cases demonstrate the continuing influence of Holmes and Brandeis.[277]

Despite the obvious influence of Holmes and Brandeis, as well as Learned Hand, *Brandenburg* leaves open a number of important questions. For example, as indicated, *Brandenburg* does not make clear whether words of incitement in connection with imminent harm are merely sufficient to justify criminalizing a speaker or whether words of incitement are also a necessary condition to do so.[278]

Another unresolved question is whether, consistent with *Brandenburg*, a court must consider the severity of the threatened harm.[279] For example, Justice Brandeis insisted in his concurring opinion in *Whitney* that the severity of the harm was relevant to whether a state may criminalize a person for speech that creates a risk of harm. In his words, a state may not punish

> as a felony the merely voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to

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[275] For example, in many conspiracy cases, the government may prove that the agreement was implicit; no specific formal words of agreement are necessary. DRESSLER, *supra* note 161, § 29.04 [A].

[276] *See* Gunther, *supra* note 175, at 754–55 (stating that *Brandenburg's* "reference to 'imminent' reflects a limited influence of Holmes, combined with later experience"); *see also* TRIBE, *supra* note 175, at 616 ("The current doctrinal synthesis, combining the best of Hand's views with the best of Holmes' and Brandeis', is that of *Brandenburg v. Ohio*. . . .").

[277] *See infra* Part III.D.

[278] *See supra* notes 262–75 and accompanying text.

[279] Writing for the Second Circuit in *Dennis v. United States*, Judge Hand found that, even where the risk of harm is slight, when the magnitude of the harm was great, the state may be able to criminalize speech. Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950) ("In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."). Chief Justice Vinson adopted that formulation of the clear and present danger test in his plurality opinion in *Dennis*. Dennis v. United States, 341 U.S. 494, 510 (1951) (Vinson, J., plurality). The second part of the Court's *Brandenburg* test suggests that the risk of harm must be significant, i.e., the harm must be "imminent." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). But it is unclear whether the Court adheres to the view that the magnitude of the harm is relevant to its analysis. In dictum, the Court has stated that "a court [must] make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978).

> advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. . . . There must be the probability of serious injury to the State.[280]

As developed below, the Supreme Court has revisited its incitement test only twice in the past thirty years.[281] Those cases have not resolved questions like the ones posed here.

D. *Post*-Brandenburg *Developments—Supreme Court Precedent*

Since *Brandenburg*, the Supreme Court has addressed incitement in two cases. The first, *Hess v. Indiana*, involved a case arising out of anti-war protests.[282] The second, *NAACP v. Claiborne Hardware Co.*, dealt with a civil action against the NAACP for damages resulting to white-owned businesses from a protracted boycott aimed at ending racially discriminatory practices.[283] While *Hess* refines the *Brandenburg* test to a limited degree, neither case, especially *Claiborne Hardware*, has drawn meaningful lines governing criminalizing incitement.[284]

In *Hess*, a local sheriff and his deputies were in the process of clearing the streets of antiwar protesters who were blocking traffic.[285] According to a stipulation, Hess, one of the protesters, said, "We'll take the fucking street later," or, "We'll take the fucking street again."[286] Two witnesses testified that Hess was not "exhorting the crowd to go back into the street . . . that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area."[287] Hess challenged his conviction for disorderly conduct on a number of grounds, including the argument that the statute, applied to his conduct, violated the First Amendment.[288]

In a per curium opinion, the Court agreed. Hess's words did not come within those narrowly limited classes of speech beyond the protection of the First Amendment.[289] The Court rejected the State's argument that his words were

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[280] Whitney v. California, 274 U.S. 357, 377–78 (1927) (Brandeis and Holmes, J.J., concurring).

[281] *See infra* Part III.D.

[282] 414 U.S. 105 (1973) (per curiam).

[283] 458 U.S. 886 (1982).

[284] *See infra* Part III.D.

[285] *Hess*, 414 U.S. at 106.

[286] *Id.* at 107.

[287] *Id.*

[288] *Id.* at 105–06.

[289] *Id.* at 107.

intended to incite further lawless action.[290] The Court found the comments to be ambiguous: Hess's statement may have been a call for moderation or, at worst, a call for illegal action at some unspecified future time.[291] Even if Hess's statement was a call for future illegal action, the State failed to demonstrate any specific action or any imminent violence.[292]

Although not explicit in the per curiam opinion, *Hess* suggests that, in First Amendment cases, the appellate court has a greater role than in other cases. The trial court found specifically that Hess intended "to incite further lawless action on the part of the crowd . . . and was likely to produce such action."[293] As made clear by the dissent[294] and by later Supreme Court cases,[295] the majority conducted an independent review of the record and substituted its judgment for that of the trial court. In doing so, the Court acted contrary to the usual standards of appellate review whereby the appellee is entitled to a consideration of the evidence and all reasonable inferences in a light most favorable to the appellee.[296] The opinion also implicitly appears to have placed the burden on the State to prove that the speech was not protected by the First Amendment.[297]

The Court showed a similar unwillingness to accept a lower court's determination that speech amounts to an "incitement" in its unanimous decision in *NAACP v. Claiborne Hardware Co.*[298] There, the Court overturned a damages award against the NAACP and several individual defendants for a boycott of white-owned businesses in Mississippi.[299]

The Mississippi courts found that NAACP leader Charles Evers was liable because of speeches that led to violence against African Americans who violated the boycott.[300] In rejecting the state supreme court's determination that Evers could be found liable, the Court discussed three possible theories by which Evers might be found liable for the conduct of others: if he authorized, directed, or ratified specific tortious activity of others; if his speeches were likely to incite lawless activity of his listeners within a reasonable period of time; or, if he gave specific instructions to carry out violent acts or threats.[301] Despite the lower court

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[290] *Id.* at 108 ("The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess's statement 'was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.'").

[291] *Id.*

[292] *Id.* at 109.

[293] *Id.* at 108.

[294] *Id.* at 109, 111–12 (Rehnquist, J., dissenting).

[295] Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984).

[296] *See, e.g.*, Boutros v. Riggs Nat'l Bank, 655 F.2d 1257, 1258 (D.C. Cir. 1981).

[297] *See Hess*, 414 U.S. at 108.

[298] 458 U.S. 886, 886–87 (1982).

[299] *Id.*

[300] *Id.*

[301] *Id.* at 927.

determination that Evers did incite the violent acts of boycott supporters, the Supreme Court held that his speeches were within "the bounds of protected speech set forth in *Brandenburg*."[302]

On one occasion, Evers told his audience that "the blacks who traded with white merchants would be answerable to him," and "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[303] On another occasion, he told a group that boycott violators would be disciplined by their own people and warned that the Sheriff could not sleep with them at night.[304] In yet another speech, he stated that "if we catch any of you going in any of them racist stores, we're gonna break your damn neck."[305] Subsequently, boycott supporters injured violators of the boycott.[306] However, Evers's statements were protected speech because the violence occurred months or weeks after the speeches.[307] In effect, the Court substituted its judgment for the trial court and determined that the speeches did not incite the violence. To hold otherwise, said the Court, would have led to imposition of liability based on a public address consisting mostly of "highly charged political rhetoric lying at the core of the First Amendment."[308]

Claiborne Hardware was even more explicit than *Hess* in recognizing a different standard of review on appeal in First Amendment cases. An appellate court's role in cases involving the First Amendment is to make an independent review of the record "to examine critically the basis upon which liability was imposed."[309] An examination of the Court's opinion demonstrates that the Court exercised its independent judgment in overturning the trial court's findings.

While it unquestionably read the record in a way that favored speech, the Court left no doubt that the State retains an interest in pursuing those who do incite imminent action. For example, it stated that had Evers's strong language "been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct."[310]

The Supreme Court has left for the lower courts numerous difficult questions about the meaning of *Brandenburg*. But three principles emerge from its short line of precedent. First, when speech values are at stake, a court has a heightened duty to review the record independently to determine whether the findings below

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[302] *Id.* at 928.

[303] *Id.* at 900 n.28.

[304] *Id.* at 902.

[305] *Id.*

[306] *Id.* at 904–06.

[307] *Id.* at 928.

[308] *Id.* at 926–27.

[309] *Id.* at 915 n.50; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

[310] *Claiborne Hardware*, 458 U.S. at 928.

are justified.[311] Second, the Court will not lightly find that threatened harm is imminent, at least not absent a showing that the threatened harm has come shortly after the speech.[312] Third, a state must prove the speaker's intent to bring about the harm; the Court will read ambiguous evidence of the speaker's intent in favor of the speaker. The Court requires intent, not mere knowledge, that the harm will occur.[313]

E. *The Pre*-Brandenburg *Cases after* Brandenburg

The Supreme Court has seldom applied its own test in Brandenburg;[314] nor has the Court explicitly repudiated its pre-*Brandenburg* decisions, except for its express overruling of *Whitney v. California*.[315]

To gauge whether the defendants' conduct in *Planned Parenthood* deserves First Amendment protection, analysis of how the pre-*Brandenburg* cases might be resolved under the Court's current approach to incitement is worthwhile. Many of those cases involved speech both containing political content and advocating lawless activity, similar to the rhetoric and conduct of the *Planned Parenthood* defendants.

In *Brandenburg*, the Supreme Court contended that its new holding was consistent with its holding in *Dennis*, and it has never overruled, with the exception of *Whitney*, its other anti-communist cases and the World War I Era cases.[316] If those cases are still good law, the Nuremberg Files would almost certainly not be entitled to First Amendment protection. That is, if the evidence in cases like *Schenck*, *Abrams*, *Debs*, and *Dennis* was sufficient to sustain criminal convictions, so too would be the evidence against the creators of the Nuremberg Files.

In all of these cases, the government proved the defendants' intent based on a fairly remote chain of inferences. For example, in *Schenck* and *Debs*, the Court upheld the jury's finding of intent as long as the jury found that the "natural and intended effect" of the defendants' antiwar activity was to frustrate the war effort.[317] In *Abrams*, the Court sustained the defendants' convictions under the Espionage Act where their actual intent was to hinder the United States'

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311 *Id.* at 915 n.50; *Hess*, 414 U.S. at 108.

312 *Claiborne Hardware*, 458 U.S. at 928.

313 *Hess*, 414 U.S. at 109.

314 *But see id.; Claiborne Hardware*, 458 U.S. at 928 (listing examples of the Supreme Court using the *Brandenburg* test).

315 *Brandenburg*, 395 U.S. at 449. Scholars have assumed that *Brandenburg* does repudiate many of its earlier, restrictive First Amendment cases. Wells, *supra* note 220, at 10 n.40.

316 *Brandenburg*, 395 U.S. at 447.

317 Schenck v. United States, 249 U.S. 47, 51 (1919); Debs v. United States, 249 U.S. 211, 214–15 (1919).

intervention against the Bolshevik Revolution.[318] The criminal intent, to interfere with the war effort against the Germans, was established through the defendants' knowledge that their conduct would interfere with that effort.[319]

As developed in more detail below,[320] evidence of the defendants' intent to harm the plaintiffs in *Planned Parenthood* is unequivocal, even under the higher standard that has evolved in *Brandenburg*, *Hess*, and *Claiborne Hardware*.[321] Evidence that the defendants knew that posting information about abortion providers, including their home and business addresses, might lead to their murder, even without further evidence of intent, would seem to satisfy the low threshold in the early clear and present danger cases.[322]

So too would evidence of a sufficient danger satisfy the early clear and present danger cases. In cases like *Schenck*, *Abrams*, *Debs*, and *Dennis*, the Court relieved the prosecution of any meaningful demonstration that the feared harm was imminent. In *Schenck*, *Abrams*, and *Debs*, the prosecutor did not have to show that anyone read the antiwar pamphlets or heard the antiwar speeches and was moved to resist the war effort.[323] The prosecutor had to show only the necessary intent (but, as indicated above, a rather watered-down showing), along with some overt act to further the unlawful goal.[324]

Again, by comparison, the evidence of imminent harm in the *Planned Parenthood* case easily meets the low threshold in the cited cases. As argued below, the harm—the murder and attempted murder of abortion providers—is not only imminent, but has occurred repeatedly.[325] And as cases like *Debs* make clear, speech itself may be sufficient to provide the overt act necessary to sustain a criminal conviction, as long as the harm is sufficiently imminent.[326] Hence, even though the Nuremberg Files only constitute speech, the illegal harm is far more imminent than the violent overthrow of the government or the frustration of the war effort, both of which were found sufficiently clear and present in the earlier cases.

Despite the Supreme Court's denial that it overruled cases like *Dennis*, its denial is open to doubt.[327] The Court has come to the view espoused by Holmes

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[318] Abrams v. United States, 250 U.S. 616, 616 (1919).

[319] *Id.* at 623–24.

[320] *See infra* Part IV.A.

[321] *See supra* notes 256–57, 290–91, 311–13 and accompanying text.

[322] *See Debs*, 249 U.S. at 216. The Court affirmed a jury instruction requiring Debs' words to have "as their natural tendency and reasonably probable effect" the obstruction of the draft. *Id. See also Abrams*, 250 U.S. at 623–24.

[323] *See supra* notes 180–93 and accompanying text.

[324] *Id.*

[325] *See infra* Part IV.B.3.

[326] *Debs*, 249 U.S. at 216.

[327] Wells, *supra* note 220, at 10 n.40. Part of the problem with the Court's test is that it has been subject to manipulation. *See id.* at 62.

and Brandeis that the Court must review the record independently to determine the sufficiency of the evidence.[328] It has required clear evidence of a specific intent to bring about the feared harm.[329] It has demanded that the harm be "extremely serious" and "the degree of imminence extremely high."[330] Imminence apparently requires a showing of a close temporal proximity between speech and violence.[331]

In light of that, were *Dennis* or the World War I Era cases to arise today, the results would almost certainly be different. For example, in the World War I cases, the government would likely have to demonstrate specific intent. Knowledge alone would be insufficient.[332] Evidence of intent would have to be unambiguous.[333] The government would have to prove that the war effort had been, or was about to be, impaired by the defendants' conduct.[334] Presumably, in *Dennis*, the government would have to prove that the defendants intended that the violent overthrow of the government occur in the near future and that violent conduct to achieve that end had taken place or was about to take place.[335] The government would have to prove more than the fact that defendants circulated Marxist propaganda or gave anti-war speeches. Those kinds of conduct may involve expressions of unpopular speech, even "vitriolic public debate,"[336] but more is required to justify their criminalization.

Recognizing that the Espionage Act and Smith Act cases should come out differently today does not leave the states unable to criminalize dangerous speech. As discussed above, vitriolic speech may cross the line and become unlawful incitement.[337] But also, with the exception of *Claiborne Hardware*, the incitement cases have all involved defendants whose alleged crime involved

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[328] Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 n.50 (1982).

[329] *Hess*, 414 U.S. at 109.

[330] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978).

[331] *Claiborne Hardware*, 458 U.S. at 928.

[332] *See Hess*, 414 U.S. at 108–09 ("And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the grounds that they had 'a tendency to lead to violence.'"); Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J. dissenting) ("[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.").

[333] *Hess*, 414 U.S. at 109.

[334] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[335] *See Hess*, 414 U.S. at 108–09 (holding that under the *Brandenburg* test, Hess's words were punishable only if they were "intended to produce" and were "likely to produce imminent disorder").

[336] Viele, Newspaper Article, *supra* note 19.

[337] *See supra* note 310 and accompanying text.

speech critical of governmental policy. The early questions challenged the war effort and the draft;[338] later cases involved participation in the Communist Party, involving the overthrow of the capitalist system.[339] In *Brandenburg*, the state attempted to criminalize a Klansman who was threatening some kind of political protest.[340] *Hess* involved anti-war protests.[341] The incitement cases all involved speech that could be characterized as political dissent.

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[338] *See supra* notes 180–86 and accompanying text (discussing Schenck v. United States, 249 U.S. 47 (1919), which held that the distribution of leaflets opposing the draft posed a "clear and present danger" of resulting in an outcome Congress has the power to prevent); *see also supra* notes 190–93 and accompanying text (discussing Abrams v. United States, 250 U.S. 616 (1919), which held that the authors of circulars criticizing the war must be accountable for the effects their circulars were likely to produce); Frohwerk v. United States, 249 U.S. 204 (1919) (holding that the First Amendment does not protect a newspaper article criticizing American participation in a foreign war). In *Frohwerk*, newspaper articles declared it a mistake to send American soldiers to France, claimed that drafted men were being sent to a foreign land to fight in a cause that neither they nor anyone else knew anything of, and reached the conviction that this was but a war to protect some rich men's money. Frohwerk was found guilty on all counts except one. In upholding Frohwerk's conviction, the Court noted that the First Amendment, while prohibiting legislation against free speech, could not have been, and obviously was not, intended to give immunity for every possible use of language. The Court determined that the judge's discretion was wrongfully exercised and that there was no ground on which to reverse. *See also supra* notes 187–89 and accompanying text (discussing Debs v. United States, 249 U.S. 211 (1919), which held that the intent to obstruct the recruiting service while delivering a speech about socialism was not speech protected by the First Amendment).

[339] *See* Gitlow v. New York, 268 U.S. 652 (1925) (holding that a "Left Wing Manifesto" advocating the duty to overthrow the government was direct incitement and not protected by the First Amendment). Gitlow arranged for the printing of a paper and delivered the first issue containing "The Left Wing Manifesto," a Communist Program and a Program of the Left Wing, to the printer. Sixteen thousand copies were made and Gitlow paid for them. Gitlow was tried and convicted for the statutory crime of criminal anarchy. The first count of the indictment charged that Gitlow had advocated, advised, and taught the duty, necessity, and propriety of overthrowing and overturning organized government by force, violence, and unlawful means in certain writings entitled "The Left Wing Manifesto." *Id.* at 655. The Court determined that the Manifesto was neither the statement of abstract doctrine nor mere prediction that industrial disturbances and revolutionary mass strikes would result spontaneously. *Id.* at 665. Instead, the Court determined that the Manifesto advocated and urged mass action that should progressively incite industrial disturbances, and through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government. *Id.* at 665–66. The Court further determined that the Manifesto contained the language of direct incitement and was not Constitutionally protected speech. *Id.* at 670. *See also supra* notes 201–17 and accompanying text (discussing Whitney v. California, 274 U.S. 357 (1927), which held that prosecution of a person for participation in the Communist Labor Party did not violate the Due Process clause of the Constitution); *supra* notes 239–52 and accompanying text (discussing Dennis v. United States, 341 U.S. 494 (1951), which held that an organizer of the Communist Party could be Constitutionally convicted of violating the Smith Act when "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger").

[340] *See supra* Part III.C (discussing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

Cases involving political dissent are those in which the First Amendment values are most important. Scholars have noted the failure of the Supreme Court to articulate a clear theory explaining the First Amendment.[342] In turn, numerous scholars have urged that the First Amendment advances individual autonomy and protects individual liberty and self-fulfillment.[343] Furthermore, they justify the First Amendment in terms of the pursuit of truth, freedom from state imposed orthodoxy, or assurance of an informed self-government.[344] Still other scholars have justified free speech based on appropriate distrust of government.[345] For example, Professor Schauer has argued that freedom of speech is based largely on a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a deeper distrust of governmental power in a more general sense.[346] Virtually all of the justifications for the First Amendment recognize its special importance in the political arena, where governmental officials have the greatest incentive to silence dissent, and democratic values are most obviously at stake. Dissent spurs public debate about how we should govern ourselves.[347]

The Supreme Court has recognized that the First Amendment's protection is most important when the speech relates to governmental policy. For example, core speech is afforded greater protection than commercial speech[348] or

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[341] *See supra* notes 282–97 and accompanying text (discussing Hess v. Indiana, 414 U.S. 105 (1973) (per curiam)).

[342] *See generally* EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (explaining that four primary values have been thought to be served by free speech: "advancing knowledge and 'truth' in the 'market place of ideas,' facilitating representative democracy and self-government, promoting individual autonomy, self-expression and self-fulfillment, and achieving a more adaptable and more stable community."); *see also* Alan E. Brownstein, *Review Essay, Alternate Maps for Navigating the First Amendment Maze,* 16 CONST. COMMENT. 101–02 (1999) ("Current First Amendment doctrine . . . may have reached such a point of incoherence and indeterminacy that this kind of common understanding no longer exists.").

[343] *See generally* EMERSON, *supra* note 342, at 6–7.

[344] *Id.*

[345] *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521 (discussing the idea that government abuse of power can be prevented by free speech).

[346] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 34 (1982).

[347] KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 6 (1999).

[348] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 779 (1976); TRIBE, *supra* note 175, at 651 ("More generally, an advertisement proposing an unlawful transaction may be forbidden on the theory that the harm threatened is within government's power to prevent—and that more speech cannot be expected to avert it."); *see also id.* at 654–55. A state cannot regulate

> an activity based on the premise that ignorance is preferable to knowledge. . . . [T]he values of free speech are not limited to political dialogue but extend to any exchange of ideas or

obscenity.[349] In its defamation cases, the Supreme Court has explicitly recognized a distinction between private citizens and public officials. Because of the need to foster vigorous public debate, public officials have limited protection against defamatory statements.[350] By contrast, states may choose to give greater protection to private citizens, unless they thrust themselves into the vortex of public debate.[351] Cases like *New York Times v. Sullivan* suggest that the First Amendment's role in supporting political debate does not leave private citizens at risk of harm from their fellow citizens.[352]

> information that might make individual choices better informed. . . . [C]ommercial information "is . . . indispensable to the formulation of intelligent opinions as to how that system ought to be regulated or altered."

Id. (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 765).

[349] Roth v. United States, 352 U.S. 964 (1957); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Miller v. California, 413 U.S. 15 (1973); TRIBE, *supra* note 175, at 661. *Miller* creates

> guidelines that the trier of fact must follow: a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . b) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined in applicable state law . . . c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id.

[350] *See* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 21.03[A] (1996). The Supreme Court has held that a public official can prevail in a defamation action only if the official demonstrates by clear and convincing evidence that the defendant's statement was made with actual malice. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964).

[351] *See* DIAMOND ET AL., *supra* note 350, § 21.03[B].

> Substantial litigation has involved who constitutes a public figure for defamation purposes. The Court has recognized two general categories of public figures: an all-purpose public figure, who is someone widely known (like William F. Buckley, Michael Jordan or Madonna) and a limited public figure, who is a person who either "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" related to that person's public figure status.

Id. Despite First Amendment concerns, the Court has not lightly found that a private citizen has met the public figure standard—indeed in most of its cases it has held that the citizen is a private, not public, figure.

[352] The effect of cases like *Firestone* and *Gertz* is that a state retains broad power to protect private citizens from harm while assuring vigorous public debate. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976). The First Amendment malice requirement does not apply if the plaintiff is a private citizen who has not become a public figure. States are, therefore, free to protect such individuals without First Amendment concerns.

IV. THE NUREMBERG FILES

A. *The Nuremberg Files and the First Amendment: The Intent Requirement*

Under current Supreme Court law, when a prosecutor brings a case that involves the line between incitement and advocacy, the evidence must demonstrate an unequivocal specific intent to bring about an evil properly addressed by the legislature.[353] This section considers whether the record in *Planned Parenthood* and evidence available elsewhere would be sufficient to demonstrate that the *Planned Parenthood* defendants intended violence against abortion providers to result from publication of their posters and the Nuremberg Files.

Were the *Planned Parenthood* defendants charged with inciting or producing violence against abortion providers, a prosecutor would have ample evidence of their intent. A jury would be entitled to consider the contents of the Nuremberg Files themselves. For example, several aspects of the files demonstrate more than a legitimate effort to collect data for possible future Nuremberg type trials. The website catalogued the fate of those about whom data has been collected.[354] The files not only asked for data but provided it for website visitors. It also provided links to inflammatory material, including grotesque pictures of aborted fetuses.[355]

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[353] Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam). The Supreme Court has not stated specifically that its intent requirement in incitement cases is equivalent to the traditional specific intent requirement, but they certainly would appear to be equivalent. That is, in crimes requiring specific intent or purpose as the relevant mental state, the prosecutor must prove beyond a reasonable doubt that the offender intended to bring about the unlawful result. *See* DRESSLER, *supra* note 161, § 8.01. In many criminal cases, prosecutors have far less evidence of intent than in the *Planned Parenthood* case where the defendants had made numerous statements concerning their views on the justified use of violence against abortion providers. Instead, in the typical prosecution where the offender has not confessed, the prosecution must rely on inferences from perceived facts. For example, a prosecutor must rely on an inference that an actor intends the natural and probable consequences of her action. *See* DRESSLER, *supra* note 161, § 8.03.

> [I]n *County Court of Ulster County v. Allen*, the Supreme Court upheld an instruction to the jury that permitted it to infer from presence of two firearms in an automobile that all four occupants of the vehicle were in illegal possession of the weapons. In the case, two very heavy, large-caliber handguns were positioned crosswise in the open handbag of a 16-year-old female occupant. The bag was either on the front seat or front floor of the car that contained her and three adult males. The Supreme Court held that, as applied to the facts of this case, the inference of constructive possession on the part of the four defendants was rationally based.

Id.

[354] *Nuremberg Files*, *supra* note 6.

[355] *Id.*

The files made numerous calls for justice, and here, especially with links to Paul Hill's essay discussing his sense of peace and God's call for him to kill Dr. Britton and other inflammatory information, the call for justice means one thing. Justice means what Bray and others define as natural justice, the right to kill those who kill the innocent.[356] As explained by one affiant whose evidence was submitted in opposition to the defendants' motion for summary judgment in *Planned Parenthood*, the posters

> are calling for the reader to intervene against a murderer who will kill if you don't stop him. Without regard to any advocacy for or against abortion, the fact is that these physicians are not murderers according to the law. So the characterization is inflammatory and places them at undue risk.[357]

The website did not merely make an argument that under the doctrine of necessity, a person may commit homicide to protect an innocent life against a culpable offender. That argument would be entitled to full First Amendment protection. Instead, the files and the links on the website allowed a strong inference that the site creators were encouraging readers to commit acts of violence against abortion providers. The links justified killing abortion providers and inflamed the viewers' passion, and then provided viewers with information necessary to act on those inflamed passions. The creators told viewers who among those on the site were still working and where the viewer could find abortion providers.[358] Absent some competing inferences, a jury would be entitled to infer the intent for their readers to commit violence from the creator's knowledge that the site could incite violence.[359]

In their writings, Bray and Ramey make the moral, Biblical, and legal arguments justifying murder.[360] That looks like the kind of advocacy that is now protected under cases like *Yates* and *Brandenburg*. But the website went well beyond abstract discussion. It identified potential victims and told would-be killers where to find them.[361]

In *Hess* and *Claiborne Hardware*, the evidence of the speakers' intent was far more equivocal than the evidence in *Planned Parenthood*, where the record revealed substantial evidence concerning the defendants' commitment to violence. Hess's remarks were truly equivocal. As construed by the majority, his comment, "We'll take the fucking street later," was either a call for action, but for action at some indefinite future time, and thus not a call for imminent action, or a

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356 *See* A TIME TO KILL, *supra* note 46, at 105; *supra* Part II.D.1.

357 Plaintiff's Memorandum, *supra* note 51, at 64–65.

358 *See supra* notes 53–57 and accompanying text.

359 People v. Lauria, 251 Cal. App. 2d 471, 478 (1967); People v. McLaughlin, 111 Cal. App. 2d 781, 789 (1952); United States v. Ramirez, 139 F.3d 34, 44–45 (5th Cir. 1998).

360 *See supra* notes 82–98 and accompanying text.

361 *See supra* notes 53–57 and accompanying text.

call for present moderation.[362] In fact, Hess's conduct immediately after his statement did not suggest that it was a call to immediate action. He apparently faced the crowd, made the comment to no one in particular and made no effort to take the street back from the police.[363]

In *Claiborne Hardware*, Evers gave emotionally charged speeches that the Court acknowledged could be construed as a call to violence. For example, he raised the fear that African-Americans who violated the proposed boycott of white businesses would be disciplined and that "necks would be broken."[364] But the Court found that the speeches were protected by the First Amendment. The Court's review of the full text of Evers's remarks led it to conclude that they were within "the bounds of protected speech set forth in *Brandenburg* [because] the lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them."[365]

The Nuremberg Files did contain a disclaimer. But examined in context, the district court concluded that the disclaimer was unconvincing.[366] The webpage included the following information: the abortion providers are accused of committing crimes against humanity and the hope is that some day, they will be executed, albeit after trial.[367] As summarized by one witness, "characterizing someone as a murderer who is not legally a murder[er] provides justification for homicide.... [The Nuremberg Files] are calling for the reader to intervene against a murderer who will kill if you don't stop him."[368]

In proving the defendants' intent, a prosecutor would not be limited to the text of the Nuremberg Files itself, even if the disclaimer on the website created doubt about their intent.[369] For example, the defendants have left an extensive trail documenting their views on the use of violence against abortion providers. Bray and Ramey have published their views that killing abortion providers is morally and legally justified. Bray created and sold a bumper sticker that read "EXECUTE ABORTIONISTS MURDERERS."[370] Other defendants used the same slogan or placed the bumper sticker on their cars.[371] The defendants

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362 Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

363 Id. at 107; *see supra* notes 312–13.

364 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

365 *Id.* at 928.

366 *See* Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1133 (D. Or. 1999).

367 *Nuremburg Files, supra* note 6.

368 Plaintiff's Memorandum, *supra* note 51, at 64.

369 In their motion for summary judgment, the defendants argued that their statements could not be viewed in context. As plaintiffs argued in opposition to that motion, intent may (and often must) be inferred from context. *Id.* at 41–51.

370 *See Planned Parenthood,* 41 F. Supp. 2d at 1137.

371 *Id.* at 1139.

precipitated a split within the anti-abortion movement and were active in forming ACLA because they refused to commit to nonviolence.[372] Various defendants supported Griffen, Shannon, and Hill after they killed or wounded abortion providers.[373] They gave financial, personal, and public support and circulated petitions urging acquittal of the defendants.[374] Repeated statements and actions in support of abortion killers along with the contents of the website itself demonstrate sufficient evidence of many of the defendants' intent in creating the website.[375]

The timing of publication of the Nuremberg Files would also be relevant to the intent of the defendants. The defendants were obviously aware that posting the names of abortion providers would lead to their murder or attempted murder. Prior to David Gunn's murder, he was the subject of a wanted poster that included the kind of personal data that the defendants included on the website.[376] Similarly, two other abortion doctors were the subject of wanted posters before their murders.[377] The defendants were aware of the connection between the appearance of a doctor's name and personal data on a wanted poster and the subsequent attempt on his life.[378] Before creating their own "Deadly Dozen" poster, some of the defendants consulted with the people who created earlier wanted posters that preceded Gunn and Britton's murders.[379]

In some contexts, the law distinguishes between knowledge and intent.[380] Knowledge may not be sufficient to sustain a conviction if a crime requires intent. *Brandenburg* and the post-*Brandenburg* cases require a showing of intent, apparently in contravention of the earlier cases where knowledge that a result might follow from one's conduct was sufficient to nullify First Amendment protection.[381] But knowledge remains relevant when a prosecutor must prove intent. A sufficient showing of knowledge may allow an inference of a defendant's intent.[382]

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372 *Id.* at 1136.

373 *Id.* at 1137, 1139, 1140, 1142–46, 1148–49.

374 *Id.*

375 *See supra* Part II.D.

376 See *Planned Parenthood,* 41 F. Supp. 2d at 1135.

377 *Id.* at 1134–35.

378 *Id.*

379 *See supra* note 120 and accompanying text.

380 MODEL PENAL CODE, § 2.06, cmt.3 (1974); *Id.* at § 5.01, cmt.7.

381 *Compare* Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (per curiam) (applying the *Brandenburg* test that speech is punishable if it both is intended to produce and is likely to produce imminent disorder), *with* Abrams v. United States, 250 U.S. 616, 620–22 (1919) (holding that if speech is likely to produce certain effects, then its speakers "must have intended" those effects, even if the speaker had a different purpose and intent).

382 MODEL PENAL CODE, § 2.06, cmt.5 (1974).

That the defendants made repeated and consistent statements endorsing violence against abortion providers distinguishes this case from *Hess* and *Claiborne Hardware*. Hess made a single statement in a context not strongly corroborative of a criminal intent.[383] Evers's speeches were filled with statements that contradicted an endorsement of violence.[384] The *Claiborne Hardware* plaintiffs offered no other evidence of Evers's intent.[385] The *Planned Parenthood* defendants have spoken repeatedly and clearly and have backed up their words with consistent action.

Another issue might arise with regard to the defendants' intent. One problem in *Brandenburg* and the Smith Act and Espionage Act cases (if they have been effectively overruled by *Brandenburg*) may be that when a speaker talks in generalities about the vengeance that a group may take against others or about the eventual and inevitable overthrow of the government, the speaker has not evidenced an intent to encourage any particular crime. That issue was not specifically addressed in *Brandenburg* because the Court held only that the statute violated the First Amendment because it criminalized mere advocacy. But a plausible consideration in whether a speaker was advocating instead of inciting may be whether the speaker urges the commission of a specific crime.[386]

If that were the case, a defendant like Brandenburg would be entitled to a First Amendment defense because he spoke only of some conditional and imprecise conduct to be taken if government leaders continued to suppress the white race. He did not incite any specific criminal act.[387] Similarly, if the Communist and Espionage cases would come out differently today, merely teaching the wisdom of Leninist-Marxist principles would be insufficient to amount to incitement, presumably because there was no intent to incite a specific crime and not just because the harm was not imminent.[388]

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383 *Hess*, 414 U.S. at 107.

384 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982).

385 *Id.* at 929.

386 Some First Amendment advocates have read Brandenburg too broadly. In arguing that the District Court erred in Planned Parenthood, Professor Gey states that the defendant in Brandenburg "specifically advocated violence against racial minorities." Gey, *supra* note 38, at 556. That is inaccurate. *See* supra notes 253–57. *But see* Rice v. Paladin Enters., Inc., 128 F.3d 233, 242–43 (4th Cir. 1997) (holding that the defendant, a book publisher, could be found liable as an aider and abettor to murder, even though the publisher was not aware of who the particular victim would be).

387 Brandenburg v. Ohio, 395 U.S. 444, 445–47 (1969).

388 In *Brandenburg*, the Court summed up its earlier holdings as having fashioned a rule requiring advocacy of imminent lawless action. 395 U.S. at 447. Presumably, the speaker must urge the commission of a particular crime, i.e., the lawless action.

Urging commission of a particular crime with a particular victim starts to look like inciting, not advocating.[389] Thus, had Brandenburg said, "Let's show the government that we are serious by burning the house of the first African-American we can find," such a speech would almost certainly cross the line to incitement. Were a speaker to say to the audience not only that violent revolution was inevitable and desirable but that the group ought to begin the revolution by storming the Pentagon or General Motors, the speaker would lose any First Amendment protection, that is, if the imminence requirement was also satisfied.[390]

By analogy, defendants Bray and Ramey could not be prosecuted for their writings in which they argue that the killing of an abortion provider is morally and legally justified. That kind of speech would appear to be the abstract advocation of violence, not its incitement.[391] But the Nuremberg Files and the Deadly Dozen posters do more than make an abstract appeal to violence. In their writing, Bray and Ramey avoid identifying any particular abortion provider who should be killed. But by naming names and providing other information that assists the reader of the Nuremberg Files to target specific victims, the *Planned Parenthood* defendants have crossed the line between mere advocacy and have incited specific crime.[392]

The point raised earlier, that virtually all of the Supreme Court cases involving incitement versus advocacy have involved criticism of governmental policy, has special importance at this juncture.[393] In all of those cases, a fact-finder would have difficulty determining whether the speaker intended to change the government's policy through lawful dissent or through unlawful acts of sabotage or violence.[394] Bringing about an end to the United States' involvement in an unjust war is a legitimate goal of political debate.[395] Given the widely

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[389] In such a case, the speaker would appear to be advocating action rather than advocating abstract doctrine. As indicated in *Yates v. United States,* advocating action is not protected by the First Amendment. 354 U.S. 298, 320 (1957).

[390] *See* United States v. Dellinger, 472 F.2d 340, 400–02 (7th Cir. 1972).

[391] *See Yates,* 354 U.S. 298; Noto v. United States, 367 U.S. 290 (1961).

[392] By comparison, in *Hess,* the Court could not determine Hess's intent, if he was urging a crime to occur, or when it would occur. The Court would have been faced with a different situation if Hess had said, "Storm the Bastille, tomorrow night!" Specifying the crime to be committed clarifies the intent. Posting the names of doctors in a context in which the speakers are urging violence against them leaves little doubt about the specific crime that is being urged. This is no debate about the morality of killing abortion providers; it is an invitation to kill the named doctors.

[393] *See supra* notes 337–41 and accompanying text.

[394] *See supra* note 337.

[395] For example, a candidate's support or opposition to the war in Vietnam was the single most important issue in the Democratic primary elections in 1968. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1972, at 71 (1973) ("The primaries of 1968 forced the wind-

shared view that the First Amendment protects political dissent and self government,[396] the Court properly should create special protection to prevent chilling political dissent where the "inciter" may merely intend to further vigorous public debate. But just as in the defamation cases involving private figures,[397] protection of individuals' interests increases as the area of discussion is further from legitimate public debate. As the speaker moves from discussion of issues of public concern, such as governmental policy, to revelation of private data about individuals, a fact-finder is more justified in finding that the speaker's intent is not to engage in public discourse.

Concern over the *Planned Parenthood* defendants' right to speak about their unpopular views is legitimate. But they are free to criticize the Court. Likewise, they are free to write about the Court's usurpation of states' power and the immorality of its position. They are free to write that killing an abortion provider is morally and Biblically justified.[398] They are free to demonstrate within reasonable distance of abortion clinics even though that conduct starts to impinge on personal rights.[399] What they cannot do, consistent with the First Amendment, is to provide potential assassins with useful information about abortion providers with the intent to increase the risk of violence against their targets.

To underscore the last point, were a person to hand a would-be assassin the names and addresses of potential victims with the intent that the assassin kill the named victim, no lawyer would raise a First Amendment defense if the person were charged as an accessory to murder.[400] One might argue that the difference between the aider who hands information to a would-be assassin and the *Planned Parenthood* defendants who published the "unWanted" posters and the Nuremberg Files is that the *Planned Parenthood* defendants published their information openly. But I contend that should not change the legal analysis. Posting the information on the Internet, rather than handing it directly to a would-

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down of the Vietnam War as first Eugene McCarthy, then Robert Kennedy illuminated the disgust of Americans with the war in Asia.").

396 *See* SULLIVAN & GUNTHER, *supra* note 374, at 4.

> Free speech has been thought to serve three principal values: advancing knowledge and "truth" in the "marketplace of ideas," facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment.... These values have animated much of the Court's reasoning in free speech cases, though not always articulately and not always consistently.

Id. (citing EMERSON, *supra* note 342).

397 *See supra* notes 350–52 and accompanying text.

398 *See supra* notes 328–36 and accompanying text.

399 *See generally* Madsen v. Women's Health Ctr., Inc. 512 U.S. 753 (1994) (discussing whether establishing a thirty-six-foot buffer zone around entrances to clinics violates the First Amendment).

400 *See* MODEL PENAL CODE § 2.06(3)(a)(ii) (1974); Morrisey v. State, 620 A.2d 207, 211 (1993).

be assassin, may allow a defendant to argue that she lacked the intent to aid the would-be assassin, presumably on the theory that no sane person would expose her criminal conduct to all the world. But that does not provide an absolute defense.

Such a defense would be factual. That is, simply soliciting a crime or aiding crime over the Internet for all to see cannot provide a complete legal defense. For example, no one would seriously suggest that solicitation of sex with a minor conducted over the Internet is protected by the First Amendment simply because it is done where others may see the communication.[401] While a jury might believe the factual assertion that an actor lacked the intent to aid a would-be assassin because she openly communicated on a website or over the Internet, the determination of intent would turn on the facts of the specific case.[402] In addition, while use of the Internet may demonstrate that one lacks the intent, its use may cut the other way as well. Its use may be far more powerful than trying to locate an individual would-be assassin; that is, an actor may expose herself to greater risk of detection by using the Internet or a website like the Nuremberg Files, but she also increases the likelihood of successfully stopping an abortion provider by publishing personal information, not otherwise available, to a larger pool of would-be assassins.

The *Planned Parenthood* defendants' intent in publishing the "unWanted" posters and the Nuremberg Files would, therefore, be a factual inquiry. As argued above, they have left a significant paper trail that creates a strong inference of their intent.[403] Posting information for all to see may or may not convince a fact-finder that they lacked the intent that otherwise seems to be amply supported by the record. The defendants are not in a position to deny knowledge that the kind of activity in which they have engaged has led to the death and injury of abortion providers.[404] That knowledge is strong evidence of intent.[405] Even the claim that a person would not openly communicate his criminal purpose may not be convincing. Some of the anti-abortion participants have acknowledged their acts

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401 *Cf.* Communications Decency Act of 1996, 47 U.S.C. §§ 223(a)(1)(B)(ii) and 223(d) (1994 & Supp. 1997); Reno v. ACLU, 521 U.S. 844 (1997) (discussing the Communications Decency Act provisions that protect minors from harmful material on the Internet); *see also* FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (upholding a declaratory order of the FCC that a monologue entitled "Filthy Words" could have been subject to administrative sanctions); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding a New York statute that prohibited selling obscene material to minors under the age of seventeen).

402 United States v. Cirilo-Munoz, 139 F.3d 34, 44 (1st Cir. 1998); United States v. Spinney, 65 F.3d 231, 237–38 (1st Cir. 1995).

403 *See supra* notes 353–92 and accompanying text.

404 *See supra* notes 376–79 and accompanying text.

405 *See supra* note 382 and accompanying text.

in open defiance of the law; devoted zealots are often willing to suffer the earthly consequences of their conduct to achieve notoriety for their causes.[406]

Based on the evidence presented in *Planned Parenthood*, a prosecutor would have ample evidence that the defendants intended to incite violence against abortion providers when they published the Nuremberg Files. In fact, a prosecutor would have far more evidence of several of the defendants' intent than would a prosecutor in the run-of-the-mill criminal case.[407]

The defendants' intent is not open to debate as it was in *Claiborne Hardware*, *Hess*, or *Abrams*. The defendants formed an organization because they believed in the use of violence against abortion providers;[408] they repeated those views in writing, in interviews, in public and in private.[409] They applauded violence against abortion providers;[410] they repeatedly worked to support people who murdered or attempted to murder abortion providers.[411] Their intent was unequivocal.

B. *The Nuremberg Files and the First Amendment: The Imminence Requirement*

Brandenburg adopted a second requirement before a speaker can be convicted for inciting others to commit criminal acts. The prosecution must show that the criminal conduct urged by the speaker was imminent.[412] Whether the harm urged by the *Planned Parenthood* defendants was sufficiently imminent is a difficult question in light of little guidance from the Supreme Court. Since *Brandenburg*, the Court has yet to find harm imminent in the two cases in which it has faced the question.[413]

This section examines Supreme Court precedent and concludes that the Court has failed to offer meaningful guidance to assess the meaning of imminence.[414] Absent a clear answer from Supreme Court cases, this section then considers the

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[406] *See Stanford Class Project, supra* note 6. Extremists like Paul Hill may even be willing to suffer the death penalty to advance their cause.

[407] United States v. Cirilo-Munoz, 139 F.3d 34, 44 (1st Cir. 1998) (stating that the criminal law does not place a special premium on direct evidence, and a defendant's intent may be inferred from the circumstances and the actions of the defendant); *see also* Wingfield v. Massie, 122 F.3d 1329, 1333 (10th Cir. 1999); People *ex rel.* W.Y.B., 515 N.W.2d 453, 455 (S.D. N.Y. 1994).

[408] Plaintiff's Memorandum, *supra* note 51, at 16–17.

[409] *See supra* II.D.1.

[410] *See, e.g., supra* notes 96–98 and accompanying text.

[411] *See, e.g., supra* notes 99–102 and accompanying text.

[412] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[413] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

[414] *See infra* Part IV.B.1.

justification for the imminence requirement and how that justification may help the Court to draw a line between permissible and impermissible speech.[415] This section then considers whether the *Planned Parenthood* defendants have threatened imminent harm.[416] Because the defendants have preached their message in an atmosphere of violence, the section concludes that, were they charged with inciting violence, a prosecutor would be able to demonstrate sufficient imminent harm to satisfy the Supreme Court's *Brandenburg* test.[417] Not only is the threatened harm imminent, the harm has occurred.

1. *The Case Law*

While *Brandenburg* articulated the imminence requirement, the Court did not address whether Brandenburg's speech threatened a sufficiently imminent harm to allow prosecution for inciting violence.[418] Both of the more recent cases have found that the harm threatened by the defendant's speech was not sufficiently imminent, and, therefore, was protected by the First Amendment. Absent a case in which the Court has found the harm sufficiently imminent, defining the line between imminent and remote harm may be difficult. But at a minimum, review of the cases allows some basis to distinguish the facts in *Planned Parenthood.*

In *Brandenburg*, the Court did not need to discuss whether the harm was imminent in light of its holding that the statute allowed the state to criminalize mere advocacy of violence.[419] We can speculate whether the Court would have upheld Brandenburg's conviction for inciting violence based on the scant evidence presented. The evidence of an intent to incite violence was almost certainly insufficient given his conditional threat of some unspecified kind of future conduct. He stated only that although the Klan was not a "revengent organization," if the federal government continued to "suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[420] While the conditional threat goes to absence of intent, it also relates to the lack of imminent harm. At most, he was threatening some kind of future conduct. But we are left guessing whether he intended a lawful protest, an illegal demonstration, a cross burning, or some other conduct.

For successful prosecution of Brandenburg, we can speculate that the prosecution would have to prove some specific crime that Brandenburg was encouraging. For example, proof that Brandenburg urged his listeners to storm the state capitol building and forcibly occupy the governor's office would almost

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[415] *See infra* Part IV.B.2.

[416] *See infra* Part IV.B.3.

[417] *Id.*

[418] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

[419] *Id.* at 448–49.

[420] *Id.* at 446.

certainly be sufficient as long as he was also urging that the crime take place at some reasonably proximate time in the future and as long as he did so in a setting that created a realistic threat of the harm resulting from his incitement.[421] How proximate the date, though, is far from settled.

Hess offers little more guidance.[422] There, too, Hess's intent was uncertain. The Court's independent review of the record left unclear whether Hess was urging some future illegal conduct (taking the street later) or whether he was urging restraint.[423] But the Court suggested that the evidence of the imminent harm was also insufficient. Even if his intent was to urge the demonstrators to return at some point to retake the streets, the evidence did not demonstrate when the crime was to take place.[424] The Court had no occasion to speculate on how proximate the illegal conduct had to be to meet its imminence test. Imminence invites line drawing and inevitably will involve some lack of precision, but *Hess* offered no guidance on how a lower court might go about defining the required proximity.

The only post-*Brandenburg* Supreme Court case that appears to be on point is *Claiborne Hardware*.[425] There, Evers gave three speeches, one in 1966, the other two in 1969, that formed part of the claim against him and the NAACP.[426] During the boycott, local boycott members formed an enforcement group and collected names of African-Americans who violated the boycott.[427] The chancellor found that ten acts of violence against the boycott violators occurred over the seven year boycott, but the chancellor specified when only five of those occurred.[428] The five episodes "identified in 1966 occurred weeks or months after the April 1, 1966 speech."[429] That was insufficient to hold Evers liable because the First Amendment allows a speaker "to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as

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421 *See* United States v. Dellinger, 472 F.2d 340, 360 (7th Cir. 1972) (reasoning that "[t]he real question is whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action"). Part of the problem in *Brandenburg* must have been the setting in which he made his remarks: he called local news reporters in an effort to publicize the Klan rally. The film aired at trial showed a mere dozen Klansmen in attendance. *Brandenburg*, 395 U.S. at 445–46. One can doubt that the dozen Klansmen presented a serious risk of grave harm to the government.

422 Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

423 *See id.* at 108–09.

424 *See id.*

425 NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

426 *See id.* at 926.

427 *Id.* at 903–04.

428 *See id.* at 904–06.

429 *Id.* at 928.

protected speech."[430] That language suggests that imminence requires a close temporal proximity, a matter of days, between the speech and the violent conduct. That conclusion would be misleading.

Not only did *Claiborne Hardware* involve civil liability, but it did so in a case in which imposing liability for the entire amount of damage on the NAACP and the regional director would have been especially unfair. Most of the harm to White merchants, the target of a boycott by African-Americans pressing their grievances for discriminatory behavior, resulted from lawful conduct.[431] Liability was premised on a few acts of violence by supporters of the boycott directed at fellow African-Americans who violated the boycott. The injured merchants sought to hold the NAACP liable based on Evers's conduct, limited to his three speeches.[432]

Although the Court's discussion left much to be desired, examined closely, it is not creating a requirement that violence must have taken place before police may intervene to arrest an inciter. Instead, the Court was dealing with the kind of showing that a civil plaintiff must make before the plaintiff can recover damages for harm caused. The criminal law does not always require actual harm before it allows the police to intervene; for example, the law of solicitation, attempt, and conspiracy allows successful prosecution long before completion of the substantive crime.[433] Not so with civil liability that almost without exception requires a showing of causation before recovery is allowed.[434]

In its discussion of Evers's liability, the Court identified three grounds upon which he could be found liable.[435] Two of those grounds make obvious that the Court had in mind the traditional causation requirement for civil liability. First, he could be found liable if he authorized, directed, or ratified specific tortious activity.[436] The third basis of liability could result if he gave specific instructions to carry out violence.[437] As in those examples, tort law holds liable tortfeasors involved in a joint enterprise for acts that they have not committed if they have agreed to or commanded those acts.[438] The second basis of liability, that Evers's

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[430] *Id.*

[431] *See id.* at 886–87.

[432] *See id.* at 929.

[433] *See* DRESSLER, *supra* note 161, §§ 28.01[A] 28.02[A]–[B].

[434] *See* DIAMOND ET AL., *supra* note 350, § 11.01 (1996).

[435] *Claiborne Hardware*, 458 U.S. at 927.

[436] *Id.*

[437] *Id.*

[438] *See* RESTATEMENT (SECOND) OF TORTS § 876 (1977).

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial

speeches were likely to incite violence within a reasonable period of time, would appear to address similar causation concerns.[439] Absent some close proximity between his speeches and the violence, the causation connection becomes too attenuated to allow liability to run to the speaker.[440]

To read *Claiborne Hardware* to require violence to occur before the state can intervene outside the context of civil liability is unwarranted. For example, we can assume that the Communist Party cases would come out differently today; therefore, merely urging the violent overthrow of the United States at some imprecise time in the future would not be enough to allow the state to criminalize the speaker.[441] But no one can doubt that the Court would uphold a state's prosecution of a speaker who urged that a group of listeners forcibly take over the headquarters of General Motors tomorrow.[442] Or, if we use the Klansmen example, one cannot doubt that a state may criminalize a speaker who instead of saying, "We ought to send all African-Americans back to Africa," or, "We ought to kill all African Americans," says, "We should kill that African-American."[443] The First Amendment simply does not require that the state delays action until

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assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. See also, id. § 877.

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of the other and is negligent in employing him, or (c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously, or (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control, or (e) has a duty to provide protection for, or to have care used for the protection of, third persons or their property and confides the performance of the duty to the other, who causes or fails to avert the harm by failing to perform the duty.

Id.

[439] *See Claiborne Hardware,* 458 U.S. at 927.

[440] Where one person urges another to act, the law often has trouble holding that the speaker caused the other person to act. That is so because the law views the actor's free choice as the cause of his or her own conduct. Indeed, in the criminal law, accomplice liability does not turn on whether an accomplice's encouragement is a cause in fact of the crime committed. To require the prosecutor to prove causation might allow an otherwise culpable offender to escape criminal liability. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,* 73 CAL. L. REV. 323, 336–37 (1985); Dow & Shieldes, *supra* note 175, at 1242–44.

[441] *See supra* notes 327–36 and accompanying text.

[442] This would appear to be advocacy of action rather than advocacy of abstract doctrine. As indicated in *Yates v. United States,* the former is not protected by the First Amendment. 354 U.S. 298 (1957).

[443] Naming or otherwise targeting a victim makes implausible a claim that the speaker was urging some abstract result.

after harm has occurred. It is enough that the harm be imminent.[444] Thus, *Claiborne Hardware* should not be read to require that criminal liability is proper only if lawless activity follows speech "within a reasonable period" of time.[445]

Even the Holmes-Brandeis dissents, if we assume that the Court meant to endorse their view in *Brandenburg*, do not offer clear guidance on the imminence requirement. Cases like *Whitney* involved little more than participation in the Communist Party.[446] *Whitney* did not involve a defendant who called for an illegal strike to shut down the government or an armed take-over of an industrial plant. *Abrams*, according to Holmes, involved a case where the specific intent was not proven and where the harm, interference with the war effort, was not sufficiently clear and present.[447] In such a case, at a minimum, Holmes would have required the prosecutor to make some meaningful showing that the defendants' distribution of leaflets threatened some actual harm.[448] But the Holmes' opinion does not intimate how long a prosecutor would have to wait to intervene. Other dissents offer little guidance as well.

The various cases do share one similarity that has increased the confusion about the imminence requirement. In the early cases, the majority did not require proof of any conduct beyond the defendants' speech;[449] in *Brandenburg*, *Hess*, and perhaps *Claiborne Hardware*, the prosecutor and plaintiffs may have relied on earlier precedent, resulting in their failure to present additional evidence beyond the defendants' speech. As a result, the record in the various cases does not demonstrate whether the defendants engaged in additional conduct that might have suggested the existence of a criminal conspiracy or other more substantial criminal behavior. The cases look like pure speech cases where the defendants are dropped onto an empty stage and make a speech for which they are criminalized. The cases do not explain the significance of the context in which the speech may have been made.

To make the point more clearly, all we know about Brandenburg is that he was a member of the Klan, he called the press and invited them to attend a Klan rally, and the press showed up to a poorly attended rally where he gave a rather incipid speech, at most suggesting some kind of conditional threat of possible

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[444] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also* MODEL PENAL CODE § 5.01(2) (1974) (detailing the law of attempt).

[445] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

[446] *See* Whitney v. California, 274 U.S. 357, 363 (1927).

[447] *See* Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

[448] *See id.* at 626–27 (Holmes, J., dissenting).

[449] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id.

illegal conduct.[450] As presented, it was an exceedingly weak case, even under the Espionage Act and Smith Act precedents.[451] But we can only speculate how the Court might have viewed a record demonstrating that Brandenburg's speech was part of a concerted plan to intimidate members of the African-American community, that Brandenburg made his statements in a context of violence against African-Americans and Jews, or that Brandenburg intended the members of his audience to commit acts of violence against minorities in the community. What if Brandenburg gave a speech urging violence in a community in which other acts of violence had recently taken place, such as targeting Jews and African-Americans?[452] In that context, may the state prosecute the speaker for inciting to violence?

One might be led to discount the significance of the context in which a person makes the contested speech. The Supreme Court examined the relevance of the political context only in *Dennis*.[453] Given our historical advantage, we know that the defendants' efforts to organize the Communist Party and to orchestrate the violent overthrow of the capitalist system did not take place and, perhaps more to the point, that the fear of such an overthrow was grossly exaggerated.[454] The plurality's willingness to take judicial notice of the Red Scare was only part of the problem; almost certainly a prosecutor could have introduced evidence from experts to demonstrate the extent of the Red Menace. Despite concern about the historical overreaction to the threat of Communism, context should matter.

Context should matter because, if speech is made in an already violent setting, that fact may demonstrate something about the speaker's intent in making speech and about the likelihood that the speaker's words will have their intended effect. Context is also relevant to assess whether harm is in fact imminent.[455] As a

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[450] Brandenburg v. Ohio, 395 U.S. 444, 445–46 (1969).

[451] *See* Schenck v. United States, 249 U.S. 47 (1919). *See also* Yates v. United States, 354 U.S. 298 (1957), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978); Dennis v. United States, 341 U.S. 494 (1951); Abrams v. United States, 250 U.S. 616 (1919).

[452] In *Brandenburg*, the Court summed up its earlier holdings as having fashioned a rule requiring advocacy of imminent lawless action. *Brandenburg*, 395 U.S. at 447. Presumably, the speaker must urge the commission of a particular crime, i.e., the lawless action.

[453] *See* Dennis v. United States, 341 U.S. 494, 510 (1951) (describing the Communist Party as "the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis").

[454] Wells, *supra* note 220, at 7–8. *See also* Dow & Shieldes, *supra* note 175, at 1231 (explaining that Judge Hand, whose formulation of the clear and present danger test was adopted in *Dennis*, had believed that a Communist threat was imminent and had compared the Communist presence in Europe to the historical movement of Islam).

[455] *See, e.g.*, Roy v. United States, 416 F.2d 874, 874 (9th Cir. 1969) (finding that the statement "I hear the President is coming to the base. I am going to get him" made from a marine base by a marine to a telephone operator constituted a threat to the life of the President because it was common knowledge that the President was expected to arrive at the marine base the following day). *Accord* United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996);

result, speech protected in one setting may not be in other settings. The problem remains, though, that the Court has not ruled definitively on the relevance of context.

Thus, because the Supreme Court upheld criminal convictions upon little more than pure speech, the factual records in the various cases offer little guidance about the context in which defendants made their speeches. The early cases, upholding convictions, allowed conviction without imminent harm; prosecutors did not need to prove any harm, other than remote theoretical harm.[456] The more recent cases reversed convictions in situations where the speaker's intent was not clear and where we can only guess what crime the defendant was urging or when that crime might take place, if at all.[457] Because the Court has not upheld a conviction under its revitalized *Brandenburg* test, and because prosecutors in the few recent cases did not anticipate heightened proof, we can only speculate about the temporal proximity between speech and threatened harm and whether a defendant's speech should be examined in the larger context in which the statement is made.

The absence of any guidance from the Supreme Court makes resolution of the question posed in this article difficult, whether the conduct of the *Planned Parenthood* defendants could be criminalized. Examination of the policies supporting the imminence requirement does offer some help, as discussed in the next sub-section.

2. *Policies Underlying Imminence*

Imminence seems to allow the state to criminalize speech if the state can show that listeners will act on the message of the speaker. The requirement has been criticized because it seems to draw a line between ineffective and effective speech: as long as one remains ineffectual, a "poor and puny anonymit[y],"[458] the speaker is protected, but she loses her First Amendment protection once she becomes an effective speaker.[459] Whether the imminence requirement makes sense and how a court ought to apply the requirement to a particular set of facts are best understood in light of the justification for the imminence requirement.

As with other aspects of the Court's First Amendment case law, the Court has not carefully analyzed the justification for the imminence requirement.[460] But the most important justification for the imminence requirement is that the answer to

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Melugin v. Hames, 38 F.3d 1478, 1484 (9th Cir. 1994); United States v. Mitchell, 812 F.2d 1250, 1255 (9th Cir. 1987); Lucero v. Trosch, 904 F. Supp. 1336, 1340 (S.D. Ala. 1995).

[456] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919).

[457] *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

[458] *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

[459] *See generally* TRIBE, *supra* note 175, at 616–17; Gunther, *supra* note 175, at 742–43.

[460] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

bad speech, absent imminent harm, is more speech, rather than suppression of speech.[461] Imminence is important for other reasons as well. For example, absent imminent harm, proof that a speaker actually intended harm to result may be more difficult, but that justification relates more to rules of evidence than it does to First Amendment theory. In some instances, absent imminent harm, the Court may have been left to guess whether the speaker had the requisite intent to incite violence.[462]

Justice Brandeis articulated the justification for the imminence requirement in his concurring opinion in *Whitney*.[463] There, he stated that "no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[464] If time exists for more speech, "the remedy to be applied is more speech, not enforced silence."[465]

The Espionage Act and Smith Act cases demonstrate how more speech may, in theory, remedy disfavored speech. A free society ought to debate whether the draft is constitutional, whether it ought to aid any particular country, or whether it ought to change the form of government under which it is organized.[466] Open debate that Communism is the wrong form of government,[467] or that the United States had a vital interest in backing those opposing the Bolshevik Revolution in Russia[468]—that is, more speech—may be the appropriate response to members of the Communist Party. In theory, a coherent debate between advocates of violent overthrow of the government and those who favor the current system might convince the "proletariat" to invest in the American system, rather than engaging in industrial sabotage.

More speech may be a plausible remedy to "bad" speech if the speaker is attacking governmental policies. Dissent plays a special role in a democracy, and

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461 *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

462 *See e.g., Hess,* 414 U.S. at 108–09.

463 *Whitney,* 274 U.S. at 372–80 (Brandeis, J., concurring) ("At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.").

464 *Id.* at 377.

465 *Id.*

466 *See* Owen M. Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405, 1407 (1986) ("Democracy promises collective self-determination—a freedom to the people to decide their own fate—and presupposes a debate on public issues that is (to use Justice Brennan's now classic formula) 'uninhibited, robust, and wide open.'") (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty,* 59 U. CHI. L. REV. 225, 226 (1992) ("The First Amendment's Free Speech Clause was intended to assure the widest possible debate about matters of concern to the community.").

467 *See* Dennis v. United States, 341 U.S. 464 (1951).

468 *See* Abrams v. United States, 250 U.S. 616 (1919).

public officials may have special incentive and power to suppress their critics. In that setting, protecting dissent furthers desirable social goals of allowing a fully informed public debate on important issues. Forcing the government to justify suppression of speech that may be political dissent, rather than a call to violence, may be necessary in light of the incentive to suppress criticism and the power to do it. Government also has the resources to protect itself as well.

While more speech may be the remedy in theory, the theory may not work as well in practice—especially when speech targets private citizens. Presumably, a debate between proponents of violence against abortion providers and other less radical pro-life advocates is the appropriate remedy rather than criminalizing Michael Bray for publishing *A Time to Kill*. Other writers or speakers may be able to demonstrate that his thesis is morally and legally flawed and thereby prevent the violence that he seemed to urge in his book. As events have demonstrated, though, that debate took place and did not stop violence.[469] And, although the debate took place, many people who were influenced by Bray's book may not have participated in the debate about the legality and morality of murder.[470]

Despite problems with the theory, we may be willing to bear the risk as a cost of the First Amendment. At least that seems to be the case with the current state of the law when Bray and other anti-abortionists attack current abortion doctrine.

That more speech is an appropriate remedy to "bad" speech makes less sense when the target of the speech is a private individual, not the government. As discussed above, public officials have power and incentive to silence dissent on matters of public importance where public debate is necessary for fully informed decision-making by voters and public officials.[471] Postponing intervention until police are certain that a speaker intends harm and represents a realistic threat poses a risk, but the government retains resources to protect itself. Private individuals are in a different position from governmental officials; while they may have incentive to squelch criticism of their conduct, they may lack the resources to do so or to protect themselves from attack. They also lack access to a public forum in which they can plead their case, that is, where they can counter "bad" speech with good speech, even if listeners are still open to be persuaded.[472]

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[469] In light of continuing violence against abortion providers, mere speech does not seem to have solved the problem.

[470] *See supra* note 136.

[471] *See supra* notes 342–52 and accompanying text.

[472] That is part of the justification for the line between public and private figures in the Supreme Court's First Amendment defamation law. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welsh, Inc., 418 U.S. 323, 344 (1974).

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id.

Even if we accept that the risk that listeners will not be persuaded by more speech as a cost of the First Amendment, the justification may help the Court to draw a meaningful line between lawful and unlawful speech. Presumably, in a case in which the state attempts to prove incitement to violence, the prosecution must demonstrate the absence of time that would allow more speech to remedy the threat created by the speech. That may be another way to characterize the Court's imminence requirement.

Although the Court has offered no clear explanation of the relevance of the context in which a speech may be made, context ought to be relevant in determining whether there is time for more speech. Whether a Klansman makes a speech in a community with a long history of racial tolerance and peace, or in a community that is in the midst of racial tension and violence, is relevant to whether harm is imminent.

However, relying on context to define imminence may create some risks. For example, as discussed above, the Espionage Act and Smith Act cases demonstrate that the judiciary has overreached to the unsubstantiated threat of overthrow of the government.[473] The plurality in *Dennis* relied on the perceived context to justify criminalizing people who, according to the proof, did nothing more than advance the long term agenda of the Communist Party.[474] Hence, some commentators have suggested that we need firmer protection for the First Amendment.[475]

But focusing on the relevance of the context in which a person speaks does not mean that we must return to the unhappy results in cases like *Dennis*. *Brandenburg* and post-*Brandenburg* case law impose a stringent intent requirement.[476] Were we able to revisit *Dennis*, and to see how it would be decided consistent with modern precedent, almost certainly, a prosecutor would have to prove more than the defendants' adherence to principles of communism. Even in a setting of violent action by radical organizations, a prosecutor would still have to demonstrate that the defendants made their statements with a specific intent to encourage the violent conduct.[477] Thus, in *Dennis*, the government would have to show not simply that the defendant urged the violent overthrow of the capitalist system but that the defendant intended to encourage a specific act of violence, for example, a violent and unlawful strike against a particular manufacturer.[478]

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[473] *See supra* Part III.B.

[474] *See* Dennis v. United States, 341 U.S. 464, 511 (1951) (finding that "a highly organized conspiracy, with rigidly disciplined members . . . coupled with the inflammable nature of world conditions . . . convince us that their convictions were justified on this score").

[475] *See generally* Dow & Shieldes, *supra* note 175, at 1218–19.

[476] *See supra* Part III.C–D.

[477] *See* Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam) ("And since there was no evidence . . . that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State . . . .").

[478] *See, e.g., supra* notes 441–48 and accompanying text.

3. *The* Planned Parenthood *Defendants*

This section examines whether the *Planned Parenthood* defendants posed a threat of sufficiently imminent harm to allow them to be prosecuted under a properly drawn statute criminalizing incitement to violence. It concludes that, despite the uncertainties of the imminence requirement, the First Amendment would not bar their prosecution.[479] To demonstrate how the imminence requirement might apply to various activities of the defendants, this section first considers how that requirement might apply to publication of *A Time to Kill* and then turns to the broader question, focusing on all of the defendants' activities relating to anti-abortion violence.

A Time to Kill may have inspired others to attempt murder.[480] Despite some hedging, Bray seems to have intended that his book lead to violence.[481] On that assumption, it is nonetheless doubtful that the harm that Bray intended to incite was sufficiently imminent to allow prosecution based on publication of the book alone. The book makes a detailed Biblical and moral argument why violence is justified; it also makes a rather uninformed legal argument based on inapplicable precedent and ignores the overwhelming legal authority that flatly contradicts his argument.[482] But the book is abstract advocacy. He discusses his theory in the abstract without targeting a particular individual.[483] Although many of his readers probably did not consider competing points of view, public debate about his thesis did follow publication of the book.[484] That is, there was an opportunity for more speech before suppression of ideas; therefore, his argument is aimed at governmental policy.

Publication of *A Time to Kill* would appear to be analogous to teaching communist principles.[485] We know whom Bray would like to see dead (all abortion providers); but such generalized desire seems similar to the situation in *Dennis*, a case which I have assumed would come out differently today in large part because there was no proof that the defendants did more than make abstract

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[479] *See infra* Part IV.B.3.

[480] *See supra* note 462.

[481] *See supra* notes 86–94 and accompanying text.

[482] *See supra* notes 86–90, 161 and accompanying text.

[483] *But see supra* note 378.

[484] *See Nightline Broadcast, supra* note 92. Pat Mahoney of the Christian Defense Coalition stated, "I'm very disturbed and upset. I'm really here, Forrest, for two reasons. Number one, to address what Michael is saying. The use of violence at clinics solves nothing practically." *Id. See also 60 Minutes II Broadcast, supra* note 80. Rev. Dowhower stated, "What worries me most is that the word of God is misrepresented, that God is portrayed as this vengeful moral absolutist who has made the eradication of abortion the all-important issue. The all-important issue is God's love, not his vengeance." *Id.*

[485] *Cf.* Dennis v. United States, 341 U.S. 464 (1951).

arguments about the overthrow of the capitalist system.[486] A person influenced by the *Dennis* defendants might be moved to commit an act of political sabotage, but we are just not willing to hold the writer accountable for such possibilities.[487]

But Bray and the other *Planned Parenthood* defendants did not limit their activities to publishing abstract arguments. Further, they engaged in provocative behavior in an atmosphere of violence.[488] That is, when judged in context, their conduct has threatened imminent harm.

Anti-abortion violence began in the 1970's,[489] but with the murder of Dr. Gunn, violence against individual abortion providers has increased dramatically.[490] As discussed above, since Gunn's murder, at least seven people have been murdered as a result of violence directed against abortion providers and eleven others wounded.[491] Gunn's murder followed the publication of a wanted poster, naming him as its target.[492] Appearance on wanted posters has proved deadly for other abortion providers as well. Both Drs. Patterson and Britton were subjects of wanted posters before their deaths.[493]

Active in the pro-life movement for some time, the defendants became involved in ACLA because they were unwilling to commit to non-violence after Dr. Gunn's murder.[494] Their activities since that time have demonstrated their awareness that the very kinds of activities in which they have engaged have resulted in violence. Aware of repeated acts of violence directed against abortion providers, many of the *Planned Parenthood* defendants helped to create the Deadly Dozen posters, the Nuremberg Files, and similar posters circulated in the St. Louis area.[495] Publication of the Deadly Dozen posters resulted in immediate

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[486] *See supra* notes 327–36 and accompanying text.

[487] Yates v. United States, 354 U.S. 298, 312–19 (1957).

[488] *See supra* Part II.D.2.

[489] *See* Wells, *supra* note 220, at 26–32.

[490] *See supra* Part II.E. *See also* Brief of Amici Curiae in Support of Appellee's Request for Affirmance, Exhibit B, at 3, Planned Parenthood v. Am. Coalition of Life Activists, (9th Cir. 2000) (No. 95-35320).

> The Feminist Majority Foundation's sixth consecutive survey of anti-abortion violence comes at the end of a year of tragic violence directed at abortion clinics and health care personnel. The year began with the fatal bombing of the All Women, New Woman Clinic in Birmingham, Alabama, which claimed the life of off-duty police officer Robert Sanderson, and severely injured nurse Emily Lyons. This violence culminated with the fatal shooting of Dr. Barnett Slepian on October 23, 1998.

Id.

[491] *See supra* Part II.E.

[492] Plaintiff's Memorandum, *supra* note 51, 5–6.

[493] *Id.* at 8, 10.

[494] *Id.* at 15–16.

[495] *See supra* Part II.D.2.

action by law enforcement agents. FBI agents immediately warned the subjects of the poster that they were at risk and offered twenty-four hour a day protection.[496]

The reaction of law enforcement to publication of the Deadly Dozen poster is strong evidence that the poster was an incitement to violence. In light of the murders that followed publication of similar posters, the fear that someone would use the information provided on the poster, not readily available elsewhere, to commit murder was real.[497] The Nuremberg Files website poses a similar risk, as demonstrated by the murder of Dr. Slepian.[498] That is, the violence urged was not just imminent, it was a continuation of violence already occurring.

While no deaths resulted from publication of posters targeting St. Louis area abortion providers, the timing of the publication demonstrates why the conduct of the *Planned Parenthood* defendants is not mere advocacy of violence but incitement of imminent harm. The defendants are aware of the connection between publication of the posters and subsequent violence directed at abortion providers.[499] Many of them have worked with those who have committed violent acts and encouraged them in their efforts.[500] They must be aware that the killing has begun and that their speech—that is, the posters—encourages violent action by people in the anti-abortion movement, even if the *Planned Parenthood* defendants endorse, but forego, violence themselves.[501] Publishing the St. Louis posters to coincide with an ACLA conference in St. Louis should be treated as an incitement to violence.

The activities of the *Planned Parenthood* defendants do not amount to mere abstract advocacy, but instead cross the line to incitement for another reason as well. Part of the problem in cases like *Brandenburg* and *Dennis* is that evidence of inciting a specific crime is vague.[502] For example, a court or jury could not know what crime Brandenburg was inciting because of his vague, conditional threat.[503] In the Communist Party cases, the overthrow of the capitalist system would almost certainly result only if many people committed numerous specific acts of violence (or perhaps, if a majority of Americans voted to adopt such a system). Absent more specific exhortation, a court or jury could only guess what crimes Communist Party officials were inciting.[504]

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[496] Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1132 (D. Or. 1999).

[497] *See supra* Part II.D.2–E.

[498] *Id.*

[499] *See supra* Part II.D.2–E.

[500] *See supra* notes 116–28 and accompanying text.

[501] *See supra* Part II.D.2.

[502] *See supra* notes 332–36 and accompanying text.

[503] Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

[504] *See supra* notes 332–36 and accompanying text.

By contrast, the *Planned Parenthood* defendants have identified potential victims of violence. Naming doctors and their supporters, providing detailed information helpful to a would-be murderer, and arguing passionately in favor of killing is a far cry from making vague statements in support of the overthrow of the capitalist system or from making theoretical arguments that killing abortion providers is justified.[505] Given the setting or context in which the defendants have published specific information about doctors providing abortion, they have crossed the line between protected and unprotected speech.

V. CONCLUSION

Radical anti-abortionists are not likely to be deterred by civil liability. The *Planned Parenthood* plaintiffs may recover little of the $107 million in damages that the jury awarded. Substantial damage awards against other anti-abortion groups[506] and the threat of damages in the *Planned Parenthood* litigation, filed before the publication of the Nuremberg Files, did not deter the defendants.[507] Not only will their conduct not be deterred, but, demonstrated by the continuing violence against abortion providers, their conduct represents a serious threat to human life. Criminalizing the defendants may be necessary to protect abortion providers.

First Amendment scholars and commentators have been consistent in their belief that the *Planned Parenthood* defendants are entitled to First Amendment protection.[508] This article has argued that their conclusion is wrong. Many of the defendants have left a paper trail, demonstrating their commitment to violence and support of murder.[509] Indeed, by comparison to many criminal cases,

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[505] *See supra* Part IV.

[506] *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); *see also* Press Release, Nat'l Org. for Women, *NOW President Patricia Ireland Lauds Planned Parenthood Victory in Oregon Anti-Abortion Terrorism Case* (Feb. 2, 1999), *available at* http://www.now.org/press/02-99/02-02-99.html (on file with the Ohio State Law Journal). On remand:

> NOW was victorious in its federal abortion rights case, *NOW v. Scheidler*, the first such class action under the Racketeer-Influenced and Corrupt Organizations Act. The jury in that case returned a unanimous verdict: Operation Rescue, Joe Scheidler and their co-defendants are racketeers and will be liable for triple damages for all of the harm their violent acts have caused to clinics.

Id.

[507] The Nuremberg Files website was put on the Internet after litigation had already begun between the parties. *See Stanford Class Project, supra* note 6 (stating that the *Planned Parenthood* suit was filed in 1995 and that in January of 1997 the Nuremberg Files website was created).

[508] *See supra* notes Part II.B.

[509] *See, e.g., supra* notes 74–90 and accompanying text.

evidence of their intent to encourage violence is substantial, including writings, public interviews, and inferences that may be drawn from their conduct.[510] With full knowledge of the violence that has followed publication of wanted posters, the *Planned Parenthood* defendants have continued to create similar documents and publish them to make them accessible to those who may intend to commit violent acts against abortion providers.[511]

The Supreme Court's precedent involving incitement is hardly consistent or clear. But close examination of the leading cases suggests that the *Planned Parenthood* defendants' conduct has crossed the line between advocacy and incitement.[512] They are committed to ending abortion through whatever means they can. They have identified specific targets of violence and have shared that information with any would-be murderer.[513] They are not "poor and puny anonymities"[514] advocating radical reform; they are people committed to a dangerous agenda.[515]

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[510] *See supra* Part II.D.1.

[511] *See supra* notes Part II.D.2.

[512] *See supra* Part IV.

[513] *See, e.g., supra* notes 354–57 and accompanying text.

[514] Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

[515] *See supra* Part IV.